Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LICK FORK MARINA, INC.,
Petitioner,

V.

STATE OF INDIANA,
Respondent.

On Petition For Writ of Certiorari
To The Indiana Court of Appeals

PETITION FOR WRIT OF CERTIORARI

James C. Tucker
Counsel of Record
Tucker and Tucker, P.C.
188 South Court Street
Paoli, IN 47454
Telephone: 812-723-2313

QUESTION PRESENTED FOR REVIEW

Has the State of Indiana, through inverse condemnation, in violation of the Indiana and United States Constitutions, taken trade fixtures and personal property from one of its citizens, without compensation of any kind, contrary to the rule first enunciated by this Court in *Van Ness v. Pacard*, 27 U.S. 137 (1829) that trade fixtures are personal property and not real property and removable by a lessee at any time before the expiration of a leasehold; in a situation where an impartial jury determined the value of that which was taken by the State of Indiana to be $432,600.00, after a three day jury trial, occurring almost two years after the trial court correctly determined that a taking had taken place, which decision by the trial court was not appealed, although it was a final appealable judgment and the Indiana Supreme Court had previously required litigants to appeal each court decision that a taking had or had not taken place?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceedings in both the Indiana Court of Appeals and subsequent denial by the Indiana Supreme Court of the *Petition to Transfer* filed by Petitioner, Lick Fork Marina, Inc., were Lick Fork Marina, Inc. and the State of Indiana (Department of Natural Resources).

There are no parent corporations of petitioner Lick Fork Marina, Inc. No publicly held corporation owns 10% or more of the stock of Lick Fork Marina, Inc.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties to the Proceeding and Rule 29.6 Statement ii

Table of Contents iii

Table of Cited Authorities iv

Opinions Below 1

Jurisdictional Statement 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Petition 13

Conclusion 27

TABLE OF CITED AUTHORITIES

Page

UNITED STATES CONSTITUTION:

Fifth Amendment to the United States Constitution 1

Fourteenth Amendment to the United States Constitution 1, 2

CASES:

Armstrong v. United States, 364 U.S. 40, 44, 46 (1960) 17

Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897) 13

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 712 (1999) 14, 16

Evansville-Vanderburgh Levee Auth. v. Towne Motel, Inc., 247 Ind. 161, 162-63, 213 N.E.2d 705, 706 (1966) 21, 22

First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314 (1987) 13

Illinois Cities Water Co. v. City of Mt. Vernon, 11 Ill. 2d 547, 550-51, 144 N.E.2d 729, 731 (1957) (dictum) 17

Lawton vs. Lawton,
3 Atk. R. 13 18

Louisville Joint Stock Land Bank v. Radford,
295 U.S. 555, 596-602 (1935) 17

Lynch v. United States,
292 U.S. 571, 579 17

Morton Grove Park District v. American National Bank & Trust Co.,
78 Ill. 2d 353, 362, 399 N.E.2d 1295, 1299, 35 Ill. Dec. 767 (1980) 17

Olson v. United States,
292 U.S. 246, 255, 78 L. Ed. 1236, 54 S. Ct. 704 (1934) 27

Palazzolo v. Rhode Island,
533 U.S. 606, 617 (2001) 13, 27

Ruckelshaus v. Monsanto Co,
467 U.S. 986 (1984) 16, 17

State v. Robertson et al,
293 N.E.2d 775 (Ind. 1973) 21

Thiesing Veneer Co. of Ind. v. State
(1970), 254 Ind. 699, 262 N.E.2d 382 22

United States v. Clarke,
445 U.S. 253, 257 (1980) 13, 14, 16, 18

United States v. Cors,
337 U.S. 325 (1949) 16

United States v. Lynah,
188 U.S. 445, 462, 468 n2 (1903) 18

Van Ness v. Pacard,
27 U.S. 137 (1829) . . . . . i, 7, 8, 18, 19, 24, 25

Warner/Elektra/Atlantic Corp. v. County of DuPage,
(CA7 ILL) 991 F 2d 1280, reh, en banc, den. (CA7 ILL)
1993 US App. LEXIS 13619 . . . . . 8, 16, 25

STATUTES AND RULES:

28 U.S.C. §1257 1

84 Stat. 1906, § 304, 42 U.S.C. § 4654 15

I.C. 32-11-1 10

I.C. 32-11-1-5 10

OTHER AUTHORITIES:

26 *Am Jur* 172 @ 595 . . . . . 8, 16

4 J. Sackman, Nichols on Eminent Domain § 12.01
(rev. 3d ed. 2000) 27

6 P. Nichols, Eminent Domain § 25.41
(3d rev. ed. 1972) 13

Black's Law Dictionary, 652 (7th ed. 1999) 23

OPINIONS BELOW

The Opinion-For Publication of the Indiana Court of Appeals is reported at 820 N.E. 2d 152 (2005) (*Pet. App.*, pp. 3a-13a) and the Decision Without Opinion of the Indiana Supreme Court denying transfer is reported at 2005 Ind. LEXIS 405. (*Pet. App.*, pp. 1a-2a). The Judgment of the Trial Court determining a taking occurred dated October 8, 2001 is found in *Petitioner's Appendix* on pages 19a-30a.

JURISDICTIONAL STATEMENT

The Order of the Indiana Supreme Court denying transfer of the judgment of the Indiana Court of Appeals was entered on April 28, 2005. The jurisdiction of this Court is requested pursuant to 28 U.S.C. §1257:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari * * * where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Fifth Amendment to the United States Constitution* applicable to the states through the *Fourteenth Amendment to the United States Constitution*, mandates in its entirety:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or

> indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The *Fourteenth Amendment to the United States Constitution, Section 1*, requires:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall; abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is a case in which after bench trial held October 8, 2001, the trial court determined a taking without just compensation in violation of the Indiana and U.S. Constitutional prohibitions thereto occurred by the State of Indiana. Only until after a three day jury trial on damages almost two years later as a result of the unconstitutional taking did the State of Indiana appeal the judgment of the trial court determining a taking occurred to the Court of Appeals of Indiana.

The inverse condemnation proceedings below arose as follows: The Patoka Lake Project is a joint reservoir project between the State of Indiana and the United States Department of the Army. (*Pet. App.* p. 41a).

The State of Indiana, Department of Natural Resources (Hereinafter "DNR") prepared and advertised a Prospectus for a marina and related facilities in the Lick Fork area of Patoka Lake, in 1979. A Lease Agreement was executed between DNR as Lessor and the Petitioner, Lick Fork Marina, Inc. (Hereinafter "Lick Fork" or "Petitioner") as Lessee on April 29, 1980 and provides in relevant part:

> Section 14.03 Title to Property.
>
> Title to any and all buildings, structures and other improvements erected or placed on the Leased Real Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee. (*Pet. App.*, p. 40a).

The Lease provided that Lick Fork paid rent to DNR and DNR received a percentage of Lick Fork's gross income. (*Pet. App.*, pp. 38a-40a, Sections 3.02 and 3.03).

During the course of the leasehold, Lick Fork constructed on the leasehold a marina building, radio tower, birdhouse poles, wire propane pen, one gazebo, octagonal wood deck, landscaping, established concrete ramps and cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, and rip-rap (hereinafter

referred to as the "*Items Condemned*"). (*Pet. App.* p. 83a-89a [p. 50, ll. 21-25; p. 51, ll. 2-4; p. 52, ll. 2-8; p. 55, ll. 20-24; p. 56, ll. 12-17; p. 57, ll. 8-9; p. 57, ll. 11-15; p. 58, ll. 7-17; p. 60, ll. 20-23; p. 61, ll. 2-4; p. 83, ll. 3-7]). Lick Fork paid for all the Items Condemned and the DNR paid nothing. (*Pet. App.*, p. 80a [p. 29, ll. 22-25; p. 30, l. 2]; pp. 88a-89a [p. 83, ll. 3-7]).

Elected Assessor Allen Thewes testified at the bench trial determining a taking occurred that Lick Fork paid personal property taxes on the Items Condemned. (*Pet. App.*, p. 79a [p. 15, ll. 2-4; p. 22, ll. 7-11]). All in-ground fuel storage tanks were registered with the Indiana Department of Environmental Management as the property of Lick Fork, and not DNR. (*Pet. App.*, pp. 82a-83a [p. 39, ll. 9-22]; pp. 95a-102a). In December, 1999, *prior to the expiration of the Lease Agreement as extended*, the DNR made an offering to the public to make proposals on what was Lick Fork Marina which included the Items Condemned. (*Pet. App.*, pp. 79a-80a [p. 27, ll. 2-5]).

On October 9, 2000 Lick Fork gave written notice to DNR that the Items Condemned were the property of Lick Fork. (*Pet. App.*, pp. 42a-45a). Also at a meeting held January 11, 2001, Lick Fork made clear to DNR that the Items Condemned had been paid for and erected by Lick Fork and were the property of Lick Fork. (*Pet. App.*, pp. 80a-82a [p. 36, ll. 20-22; p. 38, ll. 6-23]). A letter of January 18, 2001, also made clear that ownership. (*Pet. App*, pp. 46a-48a). On February 6, 2001, DNR gave written notice to Lick Fork to vacate the premises no later than March 31, 2001, mandating: "All personal property is to be removed by that date; any personal property remaining thereafter shall become the property of the State of Indiana." (*Pet. App.*, p. 49a).

Seventeen days later, on February 23, 2001, Chief of Staff and General Counsel for the DNR by letter mandated to Petitioner Lick Fork that the Items Condemned were considered by the State of Indiana to be the "property of the State of Indiana and are not to be removed." (*Pet. App.*, pp. 50a-51a). On March 1, 2001 Lick Fork through counsel wrote Doehrmann, as representative of the DNR, that the Items Condemned were the personal property of Lick Fork and that the action of the DNR constitutes a condemnation of those items. (*Pet. App.*, pp. 52a-55a). Ultimately, effective March 31, 2001, DNR leased the real estate together with all of the Items Condemned to Hoosier Hills Marina, Inc. (*Pet. App.*, pp. 79a-80a, [p. 27, ll. 2-5]).

Petitioner filed a *Complaint in Inverse Condemnation*, on April 19, 2001, alleging both violations of the Indiana and United States Constitution as follows: "Under both the Constitution of the State of Indiana and the Constitution of the United States, no person's property can be taken for a public purpose without just compensation." (*Pet. App.*, p. 47a-*Exhibit 3 of Complaint in Inverse Condemnation and incorporated therein*). On August 30, 2001, the Trial Court held a bench trial on Lick Fork's *Complaint In Inverse Condemnation*. (*Pet. App.*, p. 56a; p. 60a).

The Lease between the U.S. Army Corps. of Engineers as Lessor and DNR as Lessee for all Patoka Lake property beginning July 31, 1979 was entered into evidence at the bench trial determining a taking by inverse condemnation of the Items Condemned occurred. The Lease was at that time in full force and effect as to the rights of the State of Indiana and the Petitioner. (*Pet. App.*, p. 41a).

It is uncontroverted that the U.S. Army Corps of Engineers has not transferred any rights to the DNR to the

Items Condemned. (*Pet. App.*, pp. 40a-41a). The Corps has no property inventoried which would include the marina at the Lick Fork site and does not claim the Items Condemned. (*Pet. App.*, p. 103a; *Id.)*.

At the bench trial determining a taking occurred, Petitioner argued both Indiana and United States constitutional provisions as follows:

> Those folks, the Dukes, are using property that was placed, erected, paid for, money and sweat by the Fallon family over a period of twenty-one years. Very early on in that process of initiating proposals, it was clear that the State favored not renewing with the Fallon family, but letting someone else have it. So it was also brought to the attention of the State of Indiana that under the terms and conditions of the lease as written that the items of property that were installed by the Fallon family were theirs. That the State of Indiana which paid absolutely not one cent for any of it could not take it from the Fallon family without giving them just compensation. Of course, that's a part of the Constitution of the State of Indiana, Article 1 Section 21, as well as the United States Constitution. (*Pet. App.*, p. 57a).
>
> We'll prove they have no right to any of it and we'll prove to the Court that the Fallon family is entitled to just compensation and ask the Court to determine that that is the circumstance here under the Constitution of the State of Indiana and the United States of America and appoint three disinterested appraisers to appraise the value of the property that was taken from the Fallons and it's quite clear that personal property is the subject matter also of the

> Constitutional protections against the . . . a . . . a taking by the State without just compensation. (*Pet. App.*, p. 58a).

The trial court below relied heavily upon this Court's decision in *Van Ness v. Pacard*, 27 U.S. 137 (1829) in determining the Items Condemned by the State of Indiana were personal property of Petitioner and that a taking occurred in violation of the United States and Indiana Constitutions. In *Van Ness*, a two story house built upon a brick foundation was even deemed to be personal property and not real property and subject to removal by a lessee since it was used in trade. *Van Ness v. Pacard*, 27 U.S. 137, 146 (1829). Petitioner also has used the *Van Ness* case as the critical Constitutional analysis that the actions of the State constituted a taking at bench trial, at the jury trial on *DNR's Exceptions to the Appraisers Report* and to the Indiana Court of Appeals and Indiana Supreme Court as follows:

> For example, at bench trial, petitioner argued:
>
> > There's an old case and I've cited it in these letters. When you get a chance to read them, you'll see it. It's a United States Supreme Court case that's been adopted in Indiana with respect to trade fixtures; and it clearly says, and in that case it involved a house that was two stories high built on a brick foundation imbedded in the soil, that it was considered personal property and could have been removed was the owner of the . . . had the ownership of the lessee and the lessee could remove it before the end, which is what we ask in those letters as you'll see, the right to remove those items. And the State said no, you must not. This property is the State of Indiana's property and you may not remove it. Read the letters. You'll see it's absolutely clear. So the State took this

> property and what they claimed in the letters that were exchanged is that this is real property. It's been affixed to the real estate and it is not owned by the Fallons. We see, however, in the evidence to the Court today that if it were to be considered a part of the real estate so permanently affixed to the real estate as to become legally a part of the real estate, title would vest in the United States of America. They don't wan--. . they don't claim it." (*Pet. App.*, pp. 57a-58a).

Van Ness was also relied heavily by Petitioner in Exhibits attached and incorporated to the Complaint (*Pet. App.*, pp. 42a-45a); in Lick Fork's *Brief of Appellee* to the Court of Appeals and *Petition to Transfer* to the Indiana Supreme Court. (*Pet. App.*, pp. 31a-32a).

Further, in the trial court's *Findings of Fact Conclusions of Law and Judgment,* the extension of the Takings Clause to the United States Constitution to personal property was specifically cited by the trial court in determining a taking did in fact occur: "3. Property, in its constitutional sense, also includes personal property. 26 *Am Jur* 172 @ 595. *Warner/Elektra/Atlantic Corp. v. County of DuPage*, (CA7 ILL) 991 F 2d 1280, reh, en banc, den. (CA7 ILL) 1993 US App. LEXIS 13619."

Appraiser Charles Pund, who had extensive knowledge since he designed the construction of most of the Items Condemned testified at both bench trial and jury trial as to exactly how easily all of the Items Condemned could have been removed if Lick Fork had been permitted by DNR to remove them and even testified as to how easily the largest building, which was a wood frame structure, could have been removed. (*Pet. App.*, pp. 90a-92a [p. 99, ll. 20-25; p. 101, ll.

15-16; p. 101 ll. 17, 23-24; p. 102 ll. 2-8; 21-25; p. 103, ll. 2-9; 19-22]; 106a-107a [p. 143. ll. 10-25; p. 144, ll. 2-4]).

Another example is the gazebo which Pund testified could have just been loaded on the back of a pick-up truck or trailer. (*Pet. App.* pp. 104-105a [p. 136; ll. 8-16]). Pund testified Lechner excavation would remove the marina building, the landscaping area; which includes martin bird houses and flag poles; the concrete parking lot which was going to be torn up and hauled to Bernard Fallon, President of Lick Fork Marina, Inc's property approximately one-half mile away also on Patoka Lake; the handicap ramp and stairs; the utilities and accessories leading to docks were going to also be dug up and removed to Fallons other property. Pund also testified as to how Lechner Excavation would remove the utility lines and the rip-rap (*Pet. App.* pp. 105-106a [p. 137, ll. 2-23]; p. 107a [p. 143; ll. 13-25; p. 144; ll. 3-4]).

Court appointed appraiser Douglas Hulsman, who installed the electrical services testified at both the bench trial and jury trial that the electrical services could be removed by Lick Fork before the end of its lease had the DNR permitted removal and specifically told the judge and jury how he would do so since all were put in with cords and a conduit specifically so that Fallon could move them if needed and had in fact moved sections "practically every Spring." (*Pet. App.*, pp. 93-94a; [p. 109 ll. 13-25; p. 110 ll. 11-23;] pp. 108a-109a, [p. 210, ll. 4-11]).

Bernard Fallon testified at the bench trial and the jury trial how the removal of the Items Condemned could have been easily accomplished and that he was ready, willing and able to move all of the Items Condemned to his other property one-half mile away on Patoka Lake and did intend to do so until DNR mandated he leave all Items Condemned.

(*Pet. App.*, pp. 84a-90a [p. 54, l. 25; p. 57, ll. 15-19; p. 58, ll. 7-17; p. 59, ll. 5-13; p.61, ll. 11-13; p. 64, ll. 12-13; p. 66, l. 25; p. 67, ll. 2-4; p. 87, ll. 9-10; 12-13; p. 88 ll. 5-6; p. 92, ll. 3-5; p. 93, ll. 22-24; p. 95, ll. 3-5; p. 96; ll. 14-17]). For example, the rip-rap installed by Fallon was merely going to be removed with a scooper. Fallon was also going to remove the deck itself with a flatbed trailer and take it to his other property without even taking it apart. (*Pet. App.* p. 88a [p. 61 ll. 11-13; p. 64; ll. 12-13; p. 66; l. 25; p. 67; l. 2-4]). The electrical lines would be taken back through the conduit and just rolled up. A landscape company would remove the bushes and trees paid for and placed by the Fallons. (*Pet. App.* p. 89a [p. 87 ll. 8-13; p. 88; ll. 5-6; p. 91, ll. 24-25; p. 92 ll. 3-5; p. 93; ll. 22-24]).

After bench trial, the trial court below entered a final appealable judgment on October 8, 2001, finding a taking of the Items Condemned did occur. (*Pet. App.*, pp. 60a-61a; pp. 19a-30a). The *Findings of Fact, Conclusions of Law and Judgment* stated in part:

"JUDGMENT

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court, that the plaintiff have judgment determining an inverse condemnation of the items condemned by the State of Indiana has taken place.

As such, this matter shall proceed as if it were administered under I.C. 32-11-1, except as an inverse condemnation.

The defendant, under I.C. 32-11-1-5, may appeal from the decision in the manner that appeals are taken from final judgments in civil actions.

SO ORDERED this 8th day of October, 2001."

(Pet. App., p. 30a).

On November 30, 2001, DNR filed a "Motion to Reconsider" (*Pet. App.*, p. 61a), which was denied on January 9, 2002. (*Pet. App.*, p. 61a). The decision was not appealed. (*Pet. App.*, pp. 59a-69a).

On May 6, 2002, DNR filed its *Suggestions of Appraisers*, suggesting Steven R. Woerner who was later appointed and testified at jury trial. (*Pet. App.*, pp. 70a-71a; p. 104a). On June 10, 2002, Douglas J. Hulsman, Charles L. Pund and Steven R. Woerner appeared and accepted appointment. The Court entered a written *Oath of Appraisers* and *Written Order on Appointment of Appraisers*. (*Pet. App.*, p. 64a; pp. 72a-74a).

In their *Report of Appraisers*, all three Court appointed appraisers indicated that the cost of removing the Items Condemned was $30,200.00 compared to their fair market value of $407,400.00. (*Pet. App.*, pp. 75a-77a). The cost of restoring the land to its original condition after removal was only $2,400.00. (*Pet. App.*, p. 76a). Consistently, expert appraiser David Miller testified the cost of removal was $19,760.00 and cost of restoration of the land after removal was $2,000.00. (*Pet. App.*, p. 108a [p. 173, ll. 16-19]). The *Oath of Appraisers* and written *Order on Appointment of Appraisers* was never appealed. (*Pet. App.*, pp. 59a-69a).

The only Article in the lease agreement between DNR and Lick Fork discussing eminent domain reads:

> *Section 12.01. Taking by Eminent Domain. If, during the Demised Term, the Leased Real Estate or any substantial portion thereof shall be taken as a result or the exercise of the power of eminent domain, this lease shall terminate and each party shall look to the taking authority for compensation for any and all*

> *damage, loss or injury suffered as a result of such taking. . .* (*Pet. App.*, p. 40a).

According to the testimony of Pund, Hulsman and Steven R. Woerner, at jury trial just compensation was $374,800.00. (*Pet. App.*, pp. 75a-77a; p. 104a [p. 93, ll. 4-8]; p. 106a [p. 140, ll. 4-8]; p. 109a [p. 210, ll. 12-14]). According to Miller, just compensation was $461,240.00. (*Pet. App.*, p. 108a, [p. 173, ll. 20-22]). According to Fallon, just compensation was $669,000.00. (*Pet. App.*, p. 109a [p. 268, ll. 24-25; p. 269, l. 2]).

The jury entered a verdict against the State of Indiana, Indiana Department of Natural Resources in the amount of $432,600.00. (*Pet. App.*, pp. 16a-18a). The jury verdict was less than the amount of damages testified to by Miller. (*Pet. App.*, pp. 16a-18a; p. 108a [p. 173, ll. 20-22]). On September 8, 2003, the trial court entered judgment after jury verdict in the amount of $515,469.57, which included $432,600.00 plus statutory interest at a rate of eight percent (8%) per annum since DNR took possession on March 31, 2001. (*Pet. App.*, pp. 14a-15a; pp. 79a-80a [p. 27, ll. 2-5]).

On November 26, 2003, DNR filed a *Notice of Appeal.* (*Pet. App.*, p. 69a). On January 6, 2005, the Court of Appeals of Indiana reversed the trial court's determination after bench trial held October 8, 2001 that a taking occurred and jury verdict, holding that a taking did not occur. (*Pet. App.*, pp. 3a-13a). The Indiana Supreme Court denied transfer on April 28, 2005 without Opinion. (2005 Ind. LEXIS 405) (*Pet. App.* pp. 1a-2a).

REASONS FOR GRANTING THE PETITION

The Takings Clause of the Fifth Amendment to the United States Constitution applicable to the States through the due process clause of the Fourteenth Amendment "prohibits the government from taking private property for public use without just compensation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001), *citing Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897).

This Court has consistently held that the prohibition against taking private property for public use without just compensation applies to inverse condemnation cases such as this one: "We have recognized that [HN3] a landowner is entitled to bring such an action in inverse condemnation as a result of 'the self-executing character of the constitutional provision with respect to compensation. . . .' *United States v. Clarke*, 445 U.S. 253, 257 (1980), *quoting* 6 P. Nichols, Eminent Domain § 25.41 (3d rev. ed. 1972)." *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987).

In that case, this Court reversed a California Court of Appeals opinion in an inverse condemnation case which held that a landowner who alleged that his property had been taken by a land-use regulation could not recover damages for the time before it was ultimately determined that the land-use regulation arose to a "taking" of his property and mandated that "the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 307 (1987).

In inverse condemnation cases, or taking by seizure, the

burden shifts to the landowner "to discover the encroachment and to take affirmative action to recover just compensation." *City of Monterey v. Del Monte Dunes at Monterey*, 526 U.S. 687, 712 (1999) quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980). It is clear that Petitioner Lick Fork certainly met this duty to take affirmative action:

In December, 1999, *prior to the expiration of the Lease Agreement between DNR and Lick Fork as extended*, the DNR made an offering to the public to make proposals on what was Lick Fork Marina which included all of the Items Condemned. (*Pet. App.*, pp. 79a-80a [p. 27, ll. 2-5]). On October 9, 2000 Lick Fork gave written notice to DNR that the Items Condemned were the property of Lick Fork. (*Pet. App.*, pp. 42a-45a). Also at a meeting held January 11, 2001, Lick Fork made clear to DNR that the Items Condemned had been paid for and erected by Lick Fork and were the property of Lick Fork. (*Pet. App.*, pp. 80a-82a [p. 36, ll. 20-22; p. 38, ll. 6-23]). A letter of January 18, 2001, also memorialized that ownership. (*Pet. App*, pp. 46a-48a).

Nevertheless, on February 6, 2001, DNR gave written notice to Lick Fork to vacate the premises no later than March 31, 2001, and on February 23, 2001, Chief of Staff and General Counsel for the DNR by letter mandated to Petitioner Lick Fork that all of the Items Condemned were considered by the State of Indiana to be the "property of the State of Indiana and are not to be removed." (*Pet. App.*, pp. 50a-51a). On March 1, 2001 Lick Fork through counsel wrote Doehrmann, as representative of the DNR, that the Items Condemned were the personal property of Lick Fork and that the action of the DNR constitutes a condemnation of those items. (*Pet. App.*, pp. 52a-55a). Ultimately, effective March 31, 2001, DNR leased the real estate together with all of the Items Condemned which were paid for and erected by the

Fallon family over a period of more than twenty years to Hoosier Hills Marina, Inc. (*Pet. App.*, pp. 79a-80a, [p. 27, ll. 2-5]).

The only Article in the lease agreement between DNR and Lick Fork discussing eminent domain reads:

> *Section 12.01. Taking by Eminent Domain. If, during the Demised Term, the Leased Real Estate or any substantial portion thereof shall be taken as a result or the exercise of the power of eminent domain, this lease shall terminate and each party shall look to the taking authority for compensation for any and all damage, loss or injury suffered as a result of such taking. . .* (*Pet. App.*, p. 40a).

Consistently, Lick Fork filed its *Complaint in Inverse Condemnation*, on April 19, 2001. (*Pet. App.*, pp. 33a-37a).

In inverse condemnation cases, the property owner is placed at an even greater disadvantage than when the state initiates condemnation proceedings even when the state does not dispute the taking:

> [T]he mere "shifting of the initiative from the condemning authority to the condemnee" can place the landowner at "a significant disadvantage." *Id.* at 258; cf. id at 255 "There are important legal and practical differences between an inverse condemnation suit and a condemnation proceeding"; 84 Stat. 1906, § 304, 42 U.S.C. § 4654 (recognizing, at least implicitly, the added burden by providing for recovery of attorney's fees in cases where the government seizes property without initiating condemnation proceedings but not in ordinary

condemnation cases).

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 712 (1999) quoting *United States v. Clarke,* 445 U.S. 253, 258 (1980). Here, since the State not only disputed the taking but filed an Exception to the Report of Appraisers thus requiring a jury trial on the Appraisers Exceptions, "the disadvantage to the owner becomes all the greater." *Id.*

It is clear just as the trial court found that the Federal Constitutional prohibition against a governmental entity taking property without just compensation extends to not just real property but personal property. 26 *Am Jur* 172@595. *Warner/Elektra/Atlantic Corp. v. County of DuPage,* (CA7 ILL) 991 F 2d 1280, reh, en banc, den (CA7 ILL) 1993 US App. LEXIS 13619; *United States v. Cors,* 337 U.S. 325 (1949); *Ruckelshaus v. Monsanto Co,* 467 U.S. 986 (1984).

In *Warner/Elektra/Atlantic Corp. v. County of DuPage,* the United States Court of Appeals for the Seventh Circuit noted:

> [HN4]Nothing in the notion of "property," whether as used in the due process clause of the Fourteenth Amendment, which has been held (by incorporation of the just-compensation clause of Fifth Amendment) to require just compensation when state government takes private property for a public use, or in the constitutional and statutory provisions of Illinois governing condemnation, limits condemnation and inverse condemnation to real property. It is rare for American governments to requisition personal property, but sometimes they do so and when they do they have to pay just compensation.

Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F. 2d 1280, 1285 (7th Cir. 1993); citing *United States v. Cors,*

337 U.S. 325 (1949); *Ruckelshaus v. Monsanto Co*, 467 U.S. 986, 1001-1004 (1984); *Morton Grove Park District v. American National Bank & Trust Co.*, 78 Ill. 2d 353, 362, 399 N.E.2d 1295, 1299, 35 Ill. Dec. 767 (1980); *Illinois Cities Water Co. v. City of Mt. Vernon*, 11 Ill. 2d 547, 550-51, 144 N.E.2d 729, 731 (1957) (dictum).

Many cases decided by this Court illustrate this Court's fierce protection of our citizens against a governmental entity taking his or her property, whether real or personal, without just compensation. For example, even intangible interests have been held to be a property right protected by the Fifth Amendment's prohibition against taking without just compensation. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004 (1984). In establishing a trade secret as a property right pursuant to the Fifth Amendment's prohibition against taking without just compensation, this Court illustrated with other instances in which intangible interests were held as such:

> Although this Court never has squarely addressed the question whether a person can have a property interest in a trade secret, which is admittedly intangible, the Court has found other kinds of intangible interests to be property for purposes of the Fifth Amendment's Taking Clause. See, e.g. *Armstrong v. United States*, 364 U.S. 40, 44, 46 (1960) (materialman's lien provided for under Maine law protected by Takings Clause); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 596-602 (1935) (real estate lien protected); *Lynch v. United States*, 292 U.S. 571, 579 (valid contracts are property within meaning of the Takings Clause). *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984).

Even permanent flooding by the government of a citizen's land was found to be a compensable taking under the Fifth Amendment to the United States Constitution. *United States v. Lynah*, 188 U.S. 445, 462, 468 n2 (1903). In that case, this Court clearly distinguished condemnation proceedings and the property owner's action to recover damages for the taking such as Petitioner's herein. *United State v. Clarke*, 445 U.S. 253, 255 (1980) citing *United States v. Lynah*, 188 U.S. 445, 462, 468 n2 (1903).

Here, all of the Items Condemned were clearly personal property of Lick Fork and were taken without any compensation, let alone just compensation by the State of Indiana as this Court and the United States Constitution have mandated must be paid. This Court has made clear that trade fixtures are personal property and subject to removal *at any time* prior to the expiration of a leasehold by a tenant. In *VanNess v. Pacard,* 27 U.S. 137 (1829), this Court held:

> Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant, during his term, and were deemed personalty, for many other purposes. . . .*VanNess v. Pacard,* 27 U.S. 137, 144 (1829).
>
> But [HN3] the question, whether removable or not, does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for purposes of trade or not. A tenant may erect a large as well as a small messuage, or a soap boilery of one or two stories high, and on whatever foundations he may choose. In *Lawton vs. Lawton*, 3

> Atk. R. 13, Lord Hardwicke said, (as we have already seen) that it made no difference whether the shed of the engine be made of brick or stone. . .The only point is, whether it is accessary to carrying on the trade or not. If bona fide intended for this purpose, it falls within the exception in favour of trade. . . . .
>
> But if the residence of the family were, merely an accessory for the more beneficial exercise of the trade, and with a view to superior accommodation in this particular, then it is within the exception. There are many trades which cannot be carried on well, without the presence of many persons by night as well as by day. *Van Ness v. Pacard*, 27 U.S. 137, 147 (1829).

In that case, the building was used as a residence and to carry on the carpenter and dairy trade. The house was two stories high and built upon a brick foundation imbedded in the soil; nevertheless, it was held that it was personal property and subject to removal by the tenant at any time before the expiration of the leasehold. This Court held that the intention of the tenant was to erect buildings and equip them with machinery for the purpose of carrying on his business. *Id.* at 141.

Here, it is uncontroverted that all of the Items Condemned were used in the marina trade at all times. Even the largest structure, the marina building was merely a wood frame structure and according to Court appointed Appraiser Charles Pund: "it's light, I mean, I think it would be fairly simple, you know, for a person to be able to move something like that. . . . and we've got anchor bolts in there, six foot on center, half inch anchor bolts which . . . uh . . once you find

the pattern, I mean, basically just open the walls up on the inside, remove some drywall. You can loosen the bolts up. The building can be raised up, I mean, you could bring a crane in there and pick it up and swing it up onto the parking lot on the . . uh . . movable dollies and thus move it to the location." (*Pet. App.*, pp. 90-92a [p. 99; ll. 20-25; p. 102; ll. 23-25; p. 103, ll. 2-5]).

Compelling evidence was introduced at the bench trial determining a taking occurred and the jury trial on damages by all three court appointed appraisers, expert appraiser Miller and Fallon that the Items Condemned could have been removed by Lick Fork, that Fallon intended to do so, the real estate restored to a good condition, all at a reasonable price especially compared to the value of the Items Condemned, and in advance of the end date of the Lease. (*Pet. App.*, pp. 84a-94a [p. 54, l. 25, p. 57, ll. 15-19, p. 58, ll. 7-17; p. 59, ll. 5-13; p. 60, ll. 20-23; p. 61, ll. 2-4 and 11-13; p. 64, ll. 12-13; p. 66, l. 25; p. 67, ll. 2-4; p. 87, ll. 9-13; p. 88, ll. 5-6; p. 91, ll. 24-25; p. 92, ll. 3-5; p. 93, ll. 22-24; p. 95, ll. 3-5; p. 96, ll. 14-17; p. 99, ll. 20-25; p. 101, ll. 15-17 and 23-24; p. 102, ll. 2-8 and 21-25; p. 103, ll. 2-9 and 19-22; p. 109, ll. 10-25; p. 110, ll. 11-23]; p. 104a-109a [p. 136, ll. 8-16; p. 137, ll. 2-23; p. 143, ll. 10-25; p. 144, ll. 2-4; p. 173, ll. 16-19; p. 210, ll. 4-11]).

Lick Fork paid for the Items Condemned not DNR. (*Pet. App.*, p. 80a [p. 29, ll. 22-25; p. 30, l. 2]; p. 88a-89a [p. 83, ll. 3-7]). Lick Fork filed tax returns and paid personal property taxes on the Items Condemned. (*Pet. App.*, p. 35a; pp. 42a-45a; p. 78a-79a [p. 14, ll. 19-25; p. 15, ll. 2-4; p. 22, ll. 7-11]). All in-ground fuel storage tanks were registered with the Indiana Department of Environmental Management as the personal property of Lick Fork, and not DNR. (*Pet. App.*, pp. 82a-83a [p, 39, ll. 9-22]; pp. 95a-102a).

No evidence exists that Lick Fork or the Fallon family ever gave up any claim for the Items Condemned.[1] Here, the Lease provided for an initial ten-year term as well as an extension thereof for two additional terms of five years each. (*Pet. App.*, p. 38a). It is not logical nor reasonable to conclude that Fallon would have put the Items Condemned upon leased premises with a leasehold of only twenty years, and especially in the readily movable condition as testified by Appraisers Hulsman and Pund and Fallon himself if Fallon had not considered that the Items Condemned were his and that he could have removed or otherwise disposed of them before the leasehold expired especially since the Items Condemned were to be moved to Fallon's property only one-half mile away. Further, after a three day trial, a verdict was entered against the DNR in the amount of $432,600.00 on August 22, 2003. Much time and money was spent in the appraisal and court process.[2]

---

[1]Lick Fork continued to pay taxes for and registered the underground tanks and accessories with the State as being owned by Lick Fork. (*Pet. App.*, pp. 95a-102a). The State further admitted the underground storage tank belonged to Lick Fork by listing "Lick Fork Marina, Inc." as the owner. (*Pet. App.*, pp. 95a-102a).

[2]The judgment finding the actions of DNR constituted a taking entered on October 8, 2001, by the trial court was a final and appealable judgment pursuant to *State v. Robertson et al*, 293 N.E.2d 775 (Ind. 1973), a case decided by the Indiana Supreme Court after *Evansville-Vanderburgh Levee Auth. v. Towne Motel, Inc.*, 247 Ind. 161, 162-63, 213 N.E.2d 705, 706 (1966), the case cited in the Court of Appeals Opinion. (*Pet. App.* p. 10a). That judgment was not appealed within thirty days. Instead, DNR filed a "Motion to Reconsider" on November 30, 2001; 22 days late. (*Pet. App.*, p. 61a). DNR's "Motion to Reconsider" was denied January 9, 2002. The trial court's denial of the same was not appealed. (*Appellant's Appendix*, pp. 1-7). The appraisers were appointed on June 10, 2002. (*Pet. App.*, pp. 72a-74a). (Cont'd)

No evidence was presented by DNR that removal of the Items Condemned would cause injury to the property. In fact, the overwhelming evidence showed the contrary. DNR itself suggested appraiser Woerner, who was appointed. (*Pet. App.*, pp. 70a-71a). The position of the DNR with respect to the Items Condemned was clearly and unequivocally stated. On February 6, 2001, Davis, Deputy Director of DNR, gave notice to Lick Fork to vacate the premises no later than March 31, 2001. (*Pet. App.*, p. 49a). Davis stated: "All personal property is to be removed by that date; any personal property remaining thereafter shall become the property of the State of Indiana." (*Pet. App.*, p. 49a). In direct contravention to this prior mandate, on February 23, 2001, seventeen days later, DNR, through Carrie Doehrmann, Chief of Staff and General Counsel for DNR wrote Lick Fork through Tucker by letter which was attached thereto and incorporated into Petitioner's *Complaint in Inverse Condemnation*:

> "[*P*]*lease be advised that it is our opinion that the marina building, landscaping, concrete ramps or cement work, pads and stairs, utilities and accessories leading to the various docks, in-ground fuel storage with all attachments, utility lines and rip-rap are not personal property and as such are property of the State of Indiana and are not to be removed.*" (*Pet. App.*, pp. 50a-51a).

(Cont'd)
DNR did not appeal the Order Appointing Appraisers as *Thiesing Veneer Co. of Ind. v. State* (1970), 254 Ind. 699, 262 N.E.2d 382, another Indiana Supreme case decided after *Towne Motel* mandates. The jury trial was not held until August 20, 21, and 22, 2003. (*Pet. App.*, pp. 66a-68a).

In holding that a taking did not occur, the Indiana Court of Appeals used the definition of a fixture from *Black's Law Dictionary* and did not discuss this Court's holdings in cases involving trade fixtures: "A fixture is 'personal property that is attached to land or a building and that is regarded as an irremovable part of the real property.' Black's Law Dictionary, 652 (7th ed. 1999)." (*Pet. App.*, p. 11a). Even using arguendo the definition by the Court of Appeals, the clear evidence supports the trial court's determination that a taking by DNR occurred since none of the Items Condemned were attached to the land and *not one of the Items Condemned, not even the largest structure, the wooden marina building* was remotely regarded as irremovable according not only to Fallon but Court appointed appraisers Charles Pund and Douglas Hulsman. (*Pet. App.*, pp. 90a-94a [p. 99, ll. 20-25; p. 101, ll. 15-17 and 23-24; p. 102 ll. 2-8 and 21-25; p. 103, ll. 2-9 and 19-22; p. 109, ll. 10-25; p. 110, ll. 11-23]; 104a-107a [p. 136, ll. 8-16; p. 137, ll. 2-23; p. 143. ll. 10-25; p. 144, ll. 2-4]).

Another example which is completely inapposite to the Court of Appeals Opinion's definition of a fixture is the gazebo which Pund testified could have just been loaded on the back of a pick-up truck or trailer. (*Pet. App.* pp. 104-105a [p. 136; ll. 8-16]). Further, Pund testified Lechner Excavation would remove the marina building, the landscaping area; which includes *martin bird houses and flag poles*; the concrete parking lot which was going to be torn up and hauled to Fallon's property located a half-mile away also on Patoka Lake; the handicap ramp and stairs; the utilities and accessories leading to docks were going to also be dug up and removed to Fallons other property. Pund also testified as to how Lechner Excavation would remove the utility lines and the rip-rap (*Pet. App.* pp. 105-107a [p. 137, ll. 2-23; p. 143; ll. 13-25; p. 144; ll. 2-4]).

Court appointed appraiser Douglas Hulsman, who installed the electrical services specifically testified at both the bench trial determining a taking occurred and jury trial that all electrical lines were movable since all were put in with cords and a conduit specifically so that Bernie could move them if needed and had in fact moved sections "practically every spring." (*Pet. App.*, pp. 93-94a; [p. 109 ll. 13-25; p. 110 ll. 11-23;] pp. 108a-109a, [p. 210, ll. 4-11]). Thus, the electrical services certainly were not regarded as irremovable since they were built to be moved and were moved frequently during the course of the leasehold.

Consistently, Bernard Fallon testified at the bench trial and the jury trial the rip-rap installed by Fallon was merely going to be removed with a scooper. Fallon was also going to remove the deck itself with a flatbed trailer and take it to his other property without even taking it apart. (*Pet. App.* p. 88a [p. 61 ll. 11-13; p. 64; ll. 12-13; p. 66; l. 25; p. 67; l. 2-4]). The electrical lines would be taken back through the conduit and just rolled up. A landscape company would remove the bushes and trees paid for and placed by the Fallons. (*Pet. App.* p. 89a [p. 87 ll. 8-13; p. 88; ll. 5-6; p. 91, ll. 24-25; p. 92 ll. 3-5; p. 93; ll. 22-24;] *Pet. App.*, pp. 84a-90a [p. 54, l. 25; p. 57, ll. 15-19; p. 58, ll. 7-17; p. 59, ll. 5-13; p.61, ll. 11-13; p. 64, ll. 12-13; p. 66, l. 25; p. 67, ll. 2-4; p. 87, ll. 9-10; 12-13; p. 88 ll. 5-6; p. 92, ll. 3-5; p. 93, ll. 22-24; p. 95, ll. 3-5; p. 96; ll. 14-17]).

No where in the Indiana Court of Appeals Opinion-For Publication is the *Van Ness v. Pacard*, 27 U.S. 137 (1829) case or United States Constitutional provisions prohibiting a Taking without just compensation discussed. (*Pet. App.* pp. 3a-13a). The Indiana Supreme Court, without Opinion, denied Transfer of the decision of the Indiana Court of Appeals, thus affirming the Opinion if the Court of Appeals of Indiana

in its entirety. (*Pet. App.*, pp. 1a-2a).

Certainly the witnesses testimony at the bench trial determining a taking occurred and jury trial on damages establish the removal of Petitioner's personal property consisting of a wooden marina building, radio tower, birdhouse poles, wire propane pen, one gazebo, octagonal wood deck, landscaping (which included bird houses and flag poles), established concrete ramps and cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, and rip-rap was much easier than a building built upon a brick foundation imbedded in the soil in the *Van Ness* case. (*Pet. App.* p. 83a-89a [p. 50, ll. 21-25; p. 51, ll. 2-4; p. 52, ll. 2-8; p. 55, ll. 20-24; p. 56, ll. 12-17; p. 57, ll. 8-9; p. 57, ll. 11-15; p. 58, ll. 7-17; p. 60, ll. 20-23; p. 61, ll. 2-4; p. 83, ll. 3-7]).

The trial Court certainly quoted *Van Ness v. Pacard*, 27 U.S. 137 (1829) in the *Findings of Fact, Conclusions of Law and Judgment* determining a taking occurred as well as the *Warner/Elektra/Atlantic Corp. v. County of DuPage, 991 F. 2d 1280 (7th Cir. 1993)* case and its United States Constitutional analysis determining personal property is subject to the protection of the Takings Clause to the United States Constitution. (*Pet. App.*, pp. 27a-29a - *Conclusions of Law* 3-6).

The lease agreement itself provides further evidence which supports the trial court's determination a taking by the State of Indiana, DNR occurred herein:

> Section 14.03 Title to Property.
> Title to any and all buildings, structures and other improvements erected or placed on the Leased Real

> Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee. (*Pet. App.*, p. 40a).

The lease clearly only vests title "to any and all buildings, structures and other improvements erected or placed on the Leased Real Estate by the Lessee, *which are so permanently fixed to the real estate as to become legally a part of the real estate*" in the United States of America. (*Id.*). "All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee." (*Id.*)

The Corps of Engineers has not transferred and does not claim any rights to the Items Condemned. (*Pet. App.*, p. 40a; p. 41a; p. 103a). Thus, the plain reading of the Lease agreement between Lick Fork and DNR makes it clear: "All other property placed or erected on the leased real estate by the Lessee shall belong to Lessee." (*Pet. App.*, p. 40a, Section 14.03). Any property that is not vested *in the United States of America* has become the property of Lick Fork as the trial court correctly concluded.

The Items Condemned were all used in the marina trade, all were removable and all were clearly intended to be removed by Petitioner. (*Pet. App.*, pp. 83a-90a [p. 50, ll. 21-24; p. 51, ll. 2-4; p. 52, ll. 2-8; p. 54, l. 25; p. 55, ll. 20-24; p. 56, ll. 12-17; p. 57, ll. 8-9 and 11-19; p. 58, ll. 7-17; p. 59-60, ll. 5-13; p. 60, ll. 20-23; p. 61, ll. 2-4 and 11-13; p. 64, ll. 12-13; p. 66, l. 25; p. 67, ll. 2-4; p. 83, ll. 3-7; p. 87, ll. 9-13; p. 88, l. 5-6; p. 91, ll. 24-25; p. 92, ll. 3-5; p. 93, ll. 22-24; p. 95, ll. 3-5; p 96, ll. 14-17]; pp. 9-10 above). Thus,

it is clear that the State of Indiana, Department of Natural resources took Lick Fork Marina, Inc.'s personal property, the Items Condemned without any compensation at all, let alone just compensation in direct contradiction to the Fifth Amendment to the United States Constitution: " . . . nor shall private property be taken for public use, without just compensation." When such a taking has occurred, the owner's damages will be based upon the property's fair market value just as the jury decided in this case. *Palazzolo v. Rhode Island, 533 U.S. 606, 625 (2001).* See, e.g., *Olson v. United States*, 292 U.S. 246, 255, 78 L. Ed. 1236, 54 S. Ct. 704 (1934); 4 J. Sackman, Nichols on Eminent Domain § 12.01 (rev. 3d ed. 2000).

CONCLUSION

Petitioner respectfully requests that its *Petition For Writ of Certiorari To The Indiana Court of Appeals* be granted and further prays the judgment of the Indiana Court of Appeals be reversed and that the trial court's judgment and jury verdict below be reinstated.

Respectfully Submitted,

James C. Tucker (901-59)
Counsel of Record
Tucker and Tucker, P.C.
188 South Court Street
Paoli, IN 47454
Telephone: 812-723-2313

Attorney for Petitioner

FILED

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No.

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IN THE

Supreme Court of the United States

LICK FORK MARINA, INC.,
Petitioner,

V.

STATE OF INDIANA,
Respondent.

On Petition For Writ of Certiorari
To The Indiana Court of Appeals

PETITIONER'S APPENDIX

James C. Tucker
Counsel of Record
Tucker and Tucker, P.C.
188 South Court Street
Paoli, IN 47454
Telephone: 812-723-2313

TABLE OF APPENDICES

	Page
Appendix A - Decision of the Indiana Supreme Court Filed April 28, 2005	1a
Appendix B - Opinion for Publication of the Court of Appeals of Indiana Filed January 6, 2005 . . .	3a
Appendix C - Judgment on Jury Verdict in the Dubois Circuit Court (August 22, 2003) Filed September 8, 2003	14a
Appendix D - Verdict Form - Eminent Domain 25.51 in Dubois Circuit Court Filed August 22, 2003	16a
Appendix E - Findings of Fact, Conclusions of Law and Judgment (August 23, 2001) in Dubois Circuit Court filed October 8, 2001	19a
Appendix F - Excerpts from Brief of Appellee to the Court of Appeals of Indiana Filed August 5, 2004, and Petition to Transfer to the Supreme Court of Indiana Filed January 21, 2005	31a
Appendix G - Complaint in Inverse Condemnation in Dubois Circuit Court filed April 19, 2001 . .	33a
Appendix H - Excerpts of Lease Agreement Between Indiana Department of Natural Resources and "Lick Fork Marina, Inc." (Exhibit 1 of Complaint in Inverse Condemnation)	38a

Appendix I - Excerpts of Department of the Army Lease for Public Park and Recreational and Fish and Wildlife Management Purposes - Patoka Lake, Indiana (Attachment 1 of Exhibit 1 of Complaint in Inverse Condemnation) 41a

Appendix J - Letter to Carrie Doehrmann, Department of Natural Resources, from James C. Tucker Dated October 9, 2000 (Exhibit 2 of Complaint in Inverse Condemnation) 42a

Appendix K - Letter to John M. Davis, Department of Natural Resources, from James C. Tucker Dated January 18, 2001 (Exhibit 3 of Complaint in Inverse Condemnation) 46a

Appendix L - Letter to Bernard W. Fallon from John Davis, Deputy Director at Indiana Department of Natural Resources Dated February 6, 2001 (Exhibit 4 of Complaint in Inverse Condemnation) 49a

Appendix M - Letter to James C. Tucker from Carrie G. Doehrmann, Indiana Department of Natural Resources, Dated February 23, 2001 (Exhibit 5 of Complaint in Inverse Condemnation) 50a

Appendix N - Letter to Carrie G. Doehrmann, Department of Natural Resources, from James C. Tucker, dated March 1, 2001 (Exhibit 6 of Complaint in Inverse Condemnation) 52a

Appendix O - Excerpts of Transcript of Bench Trial Held August 30, 2001, in Dubois Circuit Court 56a

Appendix P - Chronological Case Summary from Dubois Circuit Court from 4/19/01 to 11/26/03 . 59a

Appendix Q - Defendant's Suggestions of Appraisers 70a

Appendix R - Order on Appointment of Appraisers in Dubois Circuit Court Filed June 10, 2002 . . . 72a

Appendix S - Report of Appraisers in Dubois Circuit Court Filed June 27, 2002 . . . . . 75a

Appendix T - Excerpts of Witnesses' Testimony at Bench Trial Held August 30, 2001, in Dubois Circuit Court 78a

Appendix U - Receipts for Underground Storage tank Registration, Indiana Department of Revenue Fuel & Environmental Tax Section 95a

Appendix V - Letter to Bernard W. Fallon from the Department of the Army, U.S. Army Engineer District, Louisville Corps of Engineers Dated August 27, 2001 . . . . . 103a

Appendix W - Excerpts of Witnesses' Testimony at Jury Trial Held August 20-21-22, 2003, in Dubois Circuit Court 104a

APPENDIX A - DECISION OF THE INDIANA SUPREME COURT FILED APRIL 28, 2005

INDIANA SUPREME COURT

NO. 19A05-0312-CV-00654
Lower Court Number:
19C01-0104-CP-152

2005 Ind. LEXIS 405

INDIANA DEPARTMENT OF NATURAL RESOURCES / STATE OF INDIANA

Appellant-Defendant,

v.

LICK FORK MARINA, INC.
Appellee-Plaintiff.

JUDGES: Honorable Randall T. Shepard, Chief Justice; Justice Brent E. Dickson; Justice Frank Sullivan, Jr.; Justice Theodore R. Boehm; Justice Robert D. Rucker

You are hereby notified that the Supreme Court has on this day 4/28/05

This matter has come before the Indiana Supreme Court on a Petition to Transfer jurisdiction following the issuance of a decision by the Court of Appeals. The Petition was filed pursuant to Appellate Rule 57. The Court has reviewed the decision of the Court of Appeals. Any record on appeal that was submitted has been made available to the Court for review, along with any and all briefs that may have

been filed in the Court of Appeals and all the materials filed in connection with the request to transfer jurisdiction. Each participating member of the Court has voted on the petition. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices.

Being duly advised, the Court now denies the Appellee's Petition to Transfer of Jurisdiction.

Randall T. Shepard, Chief Justice
All Justices concur. KM

WITNESS my name and seal of said Court this 28th day of April, 2005

s/David C. Lewis
Clerk, Supreme Court, Court of Appeals and Tax Court

APPENDIX B - OPINION FOR PUBLICATION OF THE COURT OF APPEALS OF INDIANA FILED JANUARY 6, 2005

COURT OF APPEALS OF INDIANA

No. 19A05-0312-CV-654

820 N.E. 2d 152

INDIANA DEPARTMENT OF NATURAL RESOURCES,
Appellant-Defendant,

v.

LICK FORK MARINA, INC.
Appellee-Plaintiff.

Appeal from the Dubois Circuit Court
The Honorable William E. Weikert, Judge
Cause No. 19C01-0104-CP-152

JUDGES: Honorable John G. Baker, Honorable John T. Sharpnack, and Honorable Ezra H. Friedlander

OPINION:

Appellant-defendant Indiana Department of Natural Resources (DNR) appeals the trial court's judgment in favor of appellee-plaintiff Lick Fork Marina, Inc. (Lick Fork). Specifically, DNR raises two issues, one of which we find dispositive: whether the trial court erred in determining that DNR inversely condemned Lick Fork's property. Finding that no taking occurred, we reverse the judgment of the trial court and remand for proceedings consistent with this opinion.

Appendix B

FACTS

The Patoka Lake Project is a joint reservoir project between the State of Indiana and the United States Department of the Army. Patoka Lake is located in Dubois, Orange and Crawford Counties. The Army Corp of Engineers manages the water storage and flood control aspects of the project, and DNR manages the recreation and wildlife activities aspects.

In 1979, the Army leased property adjacent to Patoka Lake to DNR "for public park and recreational and fish and wildlife management purposes." Appellant's App. p. 39. The federal lease allows DNR to enter into subleases to assist DNR in carrying out its responsibilities under the lease. The federal lease requires that all subleases "shall state that they are granted subject to the provisions of this lease." Appellant's App. p. 41.

Pursuant to the federal lease, DNR sought proposals for a contractual agreement for the construction and operation of a marina on Patoka Lake through a competitive bidding process. DNR issued a "Prospectus for Marina and Related Facilities" (Prospectus) in 1979 to elicit the proposals. The Prospectus advised potential candidates that an executed lease would constitute a "contract between the state of Indiana and the lessee." Hearing Ex. 7. The Prospectus also stated that the successful candidate we required to "finance, build and maintain" a slip dock facility with electricity and water on the docks, a minimum one hundred buoy rental facility, a service dock, an office building, and a service operation building.

Martin Fallon (Martin) submitted a proposal to build,

operate and maintain the marina at the Lick Fork site on Patoka Lake. He affirmed that he was familiar with the business of operating such facilities and estimated that it would cost $100,000 to provide the proposed services in the first year. DNR selected Martin's proposal, and on April 29, 1980, the parties executed a lease agreement (Lease) with Lick Fork, with Martin signing on behalf of Lick Fork.

The Lease provided that Lick Fork would pay $3,000 per year in rent, which equates to $250 per month, plus small percentages of the gross income derived from boat sales, boat rental, gas sales, and other business operations conducted on the lease premises. Lick Fork retained 90 to 99 percent of the income generated at the facility, depending on the item from which the income was derived. The Lease further stated:

> Title to Property. Title to any and all buildings, structures and other improvements erected or placed on the Leased Real Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part o the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee.

Appellant's App. p. 33. The Lease provided for a ten-year term beginning April 29, 1980, and ending on April 28, 1990. Lick Form (sic) agreed to "design, construct, and maintain the facilities described in the proposal." Appellant's App. p. 20. Lick Fork made numerous improvements to the leasehold, including: docks, above-ground tanks, temporary buildings such as storage trailers and sheds, mobile equipment,

inventory and supply items. Lick Fork also constructed on the leasehold a marina building, radio tower, birdhouse poles, wire propane pen, a gazebo, an octagonal wood deck, landscaping, established concrete ramps and cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, and rip-rap.[1] Pursuant to the Lease, Lick Fork paid property taxes on all these times.

The Lease also permitted Lick Fork to renew the Lease for two additional five-year terms on the same terms and conditions as the original lease, provided the facility had been maintained in a satisfactory condition and that customer service had been of satisfactory quality to DNR. Martin renewed the Lease in 1990. Bernard Fallon (Fallon), Martin's son, renewed the lease in 1995. DNR received complaints about the marina after Fallon began to operate it. DNR discussed those situations with Bernard and sent letters to him on some occasions.

At the expiration of the lease, Lick Fork did not vacate the property. Under the terms of the Lease, Lick Fork began to occupy the premises as a tenant from month to month. DNR allowed Fallon to remain on the property for nearly a year after the expiration of the Lease.

In December 1999, four months prior to the expiration

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[1]According to the Oxford English Dictionary, second edition, rip-rap is "[l]oose stone thrown down in water or on a soft bottom to form a foundation for a breakwater or other work. More widely, loose stone used for revetments, embankments, or the like; also, a structure made of this."

of the Lease, DNR issued a "Prospectus and Statement of Intent for the Operation of the Lick Fork Marina and Houseboat Concession" to elicit proposals for operation of the marina. Fallon submitted a proposal, as did Jeff and Shellie Dukes.

On October 9, 2000, counsel for Lick Fork wrote a letter to DNR explaining Lick Fork's position that all improvements to the real estate were the property of Lick Fork and not a part of the real estate. The letter cautioned:

> If Lick Fork Marina, Inc. is the successful offeror, there is not problem. If Mr. Dukes is the successful offeror and Lick Fork Marina, Inc. enters into an agreement of sale, there is no problem. Otherwise, the improvements which can be removed without injury to the real estate will be removed by Lick Fork Marina, Inc., prior to the end of the month-to-month lease.

Appellant's App. p. 56. On January 18, 2001, counsel for Lick Fork wrote another letter to DNR, stating:

> The bottom line is that the State certainly has the right to allow whomever it chooses to operate a marina at Lick Fork of Patoka Lake. If the State chooses Glen Dukes, then the Fallon family has a right to remove the improvements that is [sic] installed, for so long as it restores the real estate to the condition it was before it began its lease.

Appellant's App. p. 59. DNR ultimately awarded the new lease to Hoosier Hills Marina, Inc., owned an operated by Jeff

and Shellie Dukes. On February 6, 2001, DNR gave notice to Fallon to vacate the premises no later than March 31, 2001. The notice stated, in part, "All personal property is to be removed by that date; and personal property remaining thereafter shall become the property of the State of Indiana." Appellant's App. p. 60.

On February 23, 2001, counsel for DNR sent a letter to Lick Fork stating its opinion that "the marina building, landscaping, concrete ramps or cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, utility lines and rip-rap are not personal property. . ." Appellant's App. p. 61. DNR concluded that these items were considered to be the State's property and could not be removed. DNR further instructed Lick Fork to remove items of personal property on or before March 31, 2001.

On April 19, 2001, Lick Fork filed a complaint against DNR entitled, "Complaint in Inverse Condemnation," and the trial court treated the cases as one arising under Indiana's eminent domain statutes. Appellant's App. p. 8. DNR maintained that Lick Fork did not own the property in question and that the dispute regarding the Lease must be handled throughout application of contract law. On August 30, 2001, the trial court conducted a hearing to determine whether there had been a taking. The trial court adopted Lick Fork's proposed findings of fact and conclusions of law, thereby ruling that DNR acquired property belonging to Lick Fork without compensation.

DNR filed a motion to reconsider on November 30, 2001, alleging that this was a lease dispute rather than an

inverse condemnation case. On January 9, 2002, the trial court denied the motion to reconsider without additional findings or commentary. On May 30, 2002, the trial court appointed three appraisers -- Chuck Pund, Doug Hulsman and Steve Woerner -- to determine the amount of compensation owed Lick Fork. They were instructed to assess the value of the property -- including the marina building, landscaping, concrete ramps, utilities, rip-rap and in-ground fuel storage -- less the cost to remove the items and restore the property.

The jury trial to determine compensation commenced on August 20, 2003. The three court-appointed appraisers determined that the amount of compensation due was $374,800. David Miller, another expert appraiser, testified that just compensation was $461,240. At the conclusion of the trial, the jury rendered a verdict against DNR in the amount of $432,600. The trial court entered judgment against DNR "in the sum of $515,469.57, together with interest thereon from August 22, 2003 until paid at a rate of 8% per annum, together with costs." Appellant's App. p. 194. DNR filed a motion to correct error, again arguing that this case should have been decided based on contract law rather than Indiana's eminent domain statutes. The trial court denied the motion to correct error on October 31, 2003, and DNR now appeals.

DISCUSSION AND DECISION

DNR argues that the trial court erred in finding that DNR effectuated a taking. Specifically, DNR contends that this case should have been decided under principles of contract law and not eminent domain law, and that under the contract, the property in question did not belong to Lick Fork.

Appendix B

Initially, we note that Lick Fork raises the argument that DNR has waived the right to bring this issue on appeal by failing to bring it as an interlocutory appeal. However, the State does not have the right to an interlocutory appeal in an inverse condemnation case. Evansville-Vanderburgh Levee Auth. v. Towne Motel, Inc., 247 Ind. 161, 162-63, 213 N.E.2d 705, 706 (1966). In an eminent domain case, the landowner may bring an interlocutory appeal "since irreparable damage would otherwise be done to a landowner whose property might illegally be seized and destroyed and he be left only to a money judgment if the proceedings were to continue thereafter on the issue only of what was the monetary loss." Id. But in an inverse condemnation case, the public body "has already seized the land and . . . the defendant is seeking only his compensation." Id. The State will not be irreparably harmed without an interlocutory appeal, and its remedy in such cases lies in an appeal after the final judgment. Id. Thus, DNR has not waived its right to raise this issue before us.

Turning to the merit of the case, we note that we will set aside the trial court's findings of fact and conclusions of law if they are clearly erroneous. Ind. Trial Rule 51(A). When a trial court has entered findings of fact and conclusions of law, its judgment is clearly erroneous only if its findings of fact do not support its conclusions of law, or its conclusions of law do not support its judgment. Lloyd v. Lloyd, 755 N.E.2d 1165, 1167 (Ind. Ct. App. 2001). Findings are clearly erroneous when the record contains no facts to support them either directly or by inference. Id.

Where the State takes private property for public use, "a landowner is entitled to just compensation -- not a

windfall" at the expense of the pubic. Bayh v. Sonnenburg, 573 N.E.2d 398, 421 (Ind. 1991). Where there is no taking, a party is not entitled to any compensation. State v. Bishop, 800 N.E.2d 918, 926 (Ind. 2003).

A fixture is "[p]ersonal property that is attached to land or a building and that is regarded as an irremovable part of the real property." Black's Law Dictionary 652 (7th ed. 1999). The Lease stated, "Title to any and all . . . improvements . . . placed on the Leased Real Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor . . ." Appellant's App. p. 33. Thus, the Lease demonstrates that the parties intended for any fixtures placed on the property to be a part of the real estate and not personal property that could be removed by Lick Fork; real estate and fixtures were to be property of the government. Quintessential examples of fixtures include things such as the marina building, underground storage tanks, landscaping and concrete ramps. They are not rendered personal property simply because it is possible to remove them with bulldozers and large machinery. Therefore, no taking occurred, and this case is one that should have been decided under principles of contract law.

We therefore turn to the question of whether there was a violation of the Lease contract. Because a lease is a contract, the essence of the landlord-tenant relationship is contractual in nature. Schuman v. Kobets, 716 N.E.2d 355, 356 (Ind. Ct. App. 1999). When the terms of a contract are clear and unambiguous, those terms are conclusive, and the court will not construe the contract or look at extrinsic evidence but rather will simply apply the contract provisions.

Stout v. Kokomo Manor Apartments, 677 N.E.2d 1060, 1064 (Ind. Ct. App. 1997). When interpreting a contract, a court must ascertain and effectuate the intent of the parties. Samar, Inc. v. Hofferth, 726 N.E.2d 1286, 1290 (Ind. Ct. App. 2000), trans denied. The contract must be read as a whole and the language construed so as not to render any words, phrases, or terms ineffective or meaningless. Id.

The Lease required Lick Fork to "design, construct, and maintain the facilities" described in the Prospectus. Hearing Ex. 7, p. 8. To be sure, Martin's proposal stated that during the first year of the lease, he intended to "finance, build, and maintain" an approved service dock, rental boat slip, and buoy rental facility. Appellant's App. p. 48. In consideration, DNR allowed Lick Fork to use the lakefront property without purchasing it and with low rental payments. Lick Fork also retained 90 to 99 percent of the income generated at the facility; the revenue generated by the facility sometimes approached $600,000 per year. Tr. p. p. 294. DNR also benefited from the Lease, as it provided a means for DNR to make resources and recreational opportunities available to the public without expending public funds.

This contract was mutually beneficial to the parties. And Martin Fallon was familiar with the business of operating marina facilities and the laws regulating their operation. Appellant's App. p. 50. Moreover, Martin had former experience in similar enterprises and had been involved in the construction and operation of similar facilities for several years. Id. at 51. Thus, it can be said that when he signed the lease on behalf of Lick Fork, the understood the financial implications of the Lease. The contract unambiguously states that fixtures are property of the government and not of Lick

Fork. Appellant's App. p. 33. And we must give effect to the intent of the parties in agreeing to this provision. Therefore, we find that any fixtures on the real estate were not the property of Lick Fork, and Lick Fork is not entitled to compensation.

The judgment of the trial court is reversed and remanded for proceedings consistent with this opinion.

APPENDIX C - JUDGMENT ON JURY VERDICT IN THE DUBOIS CIRCUIT COURT (AUGUST 22, 2003) FILED SEPTEMBER 8, 2003

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

JUDGMENT ON JURY VERDICT

(August 22, 2003)

Come now plaintiff, Lick Fork Marina, Inc., by its President, Bernard Fallon, and its attorney, James C. Tucker, and the defendant, State of Indiana, by the Attorney General of Indiana, Steve Carter, by Marcia Avery Hanley, a Deputy Attorney General, and the Jury having returned a verdict in favor of the plaintiff, Lick Fork Marina, Inc. and against the defendant, State of Indiana, in the amount of $432,600.00, with interest to be determined by the Court, the Court does now enter judgment pursuant to Trial Rule 58(A) upon the jury verdict in the sum of $432,600.00. Pursuant to I.C. 32-24-1-11(d)(6), as this is a trial of exceptions, and the State of Indiana took possession of the property involved on March 31, 2001, the Court does now compute and allow interest at an annual rate of 8% per annum on the amount of the plaintiff's damages from the date of March 31, 2001.

Appendix C

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Lick Fork Marina, Inc., have judgment against the defendant, the State of Indiana, in the sum of $515,469.57, together with interest thereon from August 22, 2003 until paid at a rate of 8% per annum, together with costs.

SO ORDERED, this 8th day of September, 2003.

s/William E. Weikert
Judge, Dubois Circuit Court

Copies to:

Marcia Avery Hanley
Office of the Attorney General
Indiana Government Center South, Fifth Floor
402 West Washington Street
Indianapolis, IN 46204-2770

James C. Tucker
Tucker and Tucker, P.C.
188 S. Court Street
Paoli, IN 47454

APPENDIX D - VERDICT FORM - EMINENT DOMAIN 25.51 IN THE DUBOIS CIRCUIT COURT FILED AUGUST 22, 2003

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

VERDICT FORM-EMINENT DOMAIN 25.51

We, the Jury, find for the plaintiff and assess its damages in the amount of *$432,600.00* Dollars*, with interest to be computed by the Court.

The damages are broken down as follows:

1. On March 31, 2001, the "fair market value" of the personal property taken by the Defendant in the cause was *$452,500.00* Dollars, which is broken down as follows:

a. marina building @ $*150,000.00*
b. landscaping @ $*15,000.00*
c. concrete parking lot @ $53,000.00
d. concrete ramps and stairs @ $100,000.00

Appendix D

e. utilities and accessories leading to various docks @ *$25,000.00*
f. in-ground fuel tanks with all attachments @ *$35,000.00*
g. water tap and utility lines @ *$30,000.00*
h. rip-rap and gravel parking/drives @ *$27,000.00*
i. gazebo and deck @ *$17,500.00*

2. The cost to remove the described personal property from the Defendant's land is *$17,900.00* Dollars which is broken down as follows:

a. marina building @ *$4,000.00*
b. landscaping @ *$included in marina building*
c. concrete parking lot @ *$4,000.00*
d. concrete ramps and stairs @ *$2,500.00*
e. utilities and accessories leading to various docks @$700.00
f. in-ground fuel tanks with all attachments @ *$2,000.00*
g. water tap and utilities lines @ *$1,500.00*
h. rip-rap and gravel parking/drives @ *$2,700.00*
i. gazebo and deck @ *$500.00*

3. The cost of restoring the Defendant's land to its original condition after the described personal property has been removed is: *$2,000.00* Dollars.

4. Total just compensation, which is the "fair market value" of the described personal property items minus the cost to remove them from the Defendant's land and the cost of restoring the Defendant's land to its original condition is: *$432,600.00* Dollars*.

Appendix D

*The numbers denoted by the * should be the same.

8/22/03
Date

s/Marsha Stallings
Foreperson

APPENDIX E - FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT IN THE DUBOIS CIRCUIT COURT (AUGUST 23, 2001) FILED OCTOBER 08, 2001

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT
(August 23, 2001)

Come now Plaintiff, Lick Fork Marina, Inc. (hereinafter also referred to as Lick Fork), by its President, Bernard W. Fallon, and its attorneys, James C. Tucker and Jennifer A. Tucker, of Tucker and Tucker, P.C., and the Defendant, State of Indiana, by its Attorney General, Steve Carter, by Marcia Avery Hanley, Deputy Attorney General, and this cause is submitted to the Court for hearing upon the Notice to Appear in Court, the Complaint in Inverse Condemnation filed by the Plaintiff and the Answer and Affirmative Defenses filed by the Defendant. The Court announces that the matter is called for hearing in the first step of an inverse condemnation case, that is, to determine whether there has been a compensable taking.

Appendix E

The Court hears the evidence of the parties, and having taken the matter under advisement and now being duly advised in the premises, makes the following findings:

FINDINGS OF FACT

1. The Patoka Lake was created by the U.S. Army Corps. of Engineers which owns the real estate comprising the lake and certain adjacent real estate.

2. The U.S. Army Corps. of Engineers and the State of Indiana as Lessor and Lessee, respectively, entered into a Lease for Public Park and Recreational and Fish and Wildlife Management Purposes for Patoka Lake, for so long as the Government continues to operate the project, beginning July 31, 1979. A copy of the Lease between the Department of the Army and the State of Indiana, Department of Natural Resources was admitted into the evidence of this trial as a part of Exhibit 1, being denominated as Attachment 1 to Exhibit 1. The Lease is still in full force and effect.

3. The State of Indiana, Department of Natural Resources prepared and advertised a Prospectus for a marina and related facilities in the Lick Fork area of Patoka Lake, in 1979, and advertised for proposals. A copy of the Prospectus is in the evidence as Exhibit 7.

4. Martin Fallon, the now deceased father of Bernard W. Fallon, entered into negotiations with the State of Indiana for a Lease Agreement pertaining to the Lick Fork State Recreation area on the Patoka Lake. Eventually a Lease Agreement was executed between the State of Indiana through its Department of Natural Resources as Lessor and Lick Fork

Marina, Inc. as Lessee on the 29th day of April, 1980. The Lease was admitted to the evidence as Exhibit 1. The Lease was for 10 years, beginning April 29, 1980.

5. Section 14.03 of Exhibit 1 reads as follows:

> *Title to Property. Title to any and all buildings, structures and other improvements erected or placed on the Leased Real Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee.*

That Exhibit 1 provided for a ten year lease beginning April 29, 1980 and ending on April 28, 1990. The Lease also provided for extension thereof for two additional terms of five years each. The renewals occurred. The Lease was scheduled under its terms to expire the 28th day of April, 2000. After the 28th day of April, 2000, Exhibit 1 (the Lease of 1980 wherein Plaintiff was the Lessee and Defendant was Lessor) converted to a month-to-month tenancy under Section 2.04 and Lick Fork remained in possession until March 31, 2001.

6. The Lease between the Department of the Army as Lessor and the State of Indiana, Department of Natural Resources (Attachment 1 and made a part of Exhibit 1 the Lease between the State of Indiana as Lessor and Lick Fork Marina, Inc. as Lessee) provided in pertinent part, as follows:

Appendix E

"If, however, this lease is revoked, the Lessee shall vacate the premises, remove its property therefrom, and restore the premises as aforesaid within such time as the Secretary of the Army may designate . . . "

7. During the term of its Lease with the State of Indiana, Lick Fork made numerous improvements to its leasehold. Included in those improvements were docks, above-ground tanks, temporary buildings such as storage trailers and sheds, mobile equipment, inventory and supply items. The State of Indiana concurred that those items were always and remain the property of Lick Fork.

8. However, during the course of the leasehold, Lick Fork further constructed on the leasehold a marina building, radio tower, birdhouse poles, wire propane pen, one gazebo, octagonal wood deck, landscaping, established concrete ramps and cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, and rip-rap (hereinafter referred to as the "items condemned"). Lick Fork paid for all of the items condemned and Defendant, State of Indiana paid nothing for them.

9. Lick Fork paid property taxes on all of the items condemned as owner. All in-ground fuel storage tanks were registered with the Indiana Department of Environmental Management as the property of Lick Fork Marina, Inc., and not the State of Indiana.

10. In December, 1999, prior to the expiration of Exhibit 1 as extended, the Defendant, State of Indiana made an offering to the public to make proposals on what was at

that time the Lick Fork Marina. The State claimed that it had a right to offer as "available to the proposer" permanently constructed buildings, underground storage tanks and utilities, roads, parking lots and paving.

11. Ultimately, effective April 1, 2001, the Defendant leased the real estate together with the items condemned to Hoosier Hills Marina, Inc. and/or Jeff Dukes and Shellie Dukes.

12. On October 9, 2000, the attorney for Lick Fork wrote Carrie Dochtmann, Chief of Staff and General Counsel for the Indiana Department of Natural Resources a letter by facsimile giving written notice to the Defendant, State of Indiana, that the items condemned were the property of Lick Fork.

13. On January 11, 2001, Bernard W. Fallon, President of Lick Fork Marina, Inc., and its attorney, James C. Tucker, met with John M. Davis, Deputy Director of the Department of Natural Resources and Gary Miller, Assistant Director of State Parks and Reservoirs.

14. Lick Fork, in the meeting of January 11, 2001, made it clear to the representatives of the Defendant that the items condemned had been paid for and erected by Lick Fork and were the property of Lick Fork. A letter of January 18, 2001, to John M. Davis from James C. Tucker, a copy of which was admitted as Exhibit 3, made clear that ownership.

15. On February 6, 2001, John M. Davis, Deputy Director of Indiana Department of Natural Resources, gave notice to Lick Fork to vacate the premises no later than

March 11, 2001. In the letter, Mr. Davis stated: "All personal property is to be removed by that date, any personal property remaining thereafter shall become the property of the State of Indiana." The letter of February 6, 2001 was admitted in the evidence as Exhibit 4.

16. On February 23, 2001, by a letter sent by facsimile by Carrie G. Doehrmann, Chief of Staff and General Counsel for the Indiana Department of Natural Resources to James C. Tucker on behalf of Lick Fork, (a copy was admitted in the evidence as Exhibit 5), the State of Indiana made it clear that the items condemned were considered by the State of Indiana to be the "property of the State of Indiana and are not to be removed."

17. On March 1, 2001, by facsimile, James C. Tucker as attorney for Lick Fork wrote Carrie G. Doehrmann, as representative of the Defendant, in response, to indicate that the items condemned were the property of Lick Fork and that the action of the State of Indiana constitutes a condemnation of those items. A copy of the facsimile letter of March 1, 2001 was admitted in the evidence as Exhibit 6.

18. That all of the improvements to the Lick Fork Marina were made by the Fallon family and Plaintiff, Lick Fork Marina, Inc., and none by the State of Indiana. All items condemned were intended to be used in the marina business and were in fact used in the marina business, without exception. All were used in trade.

19. Before the end of its lease period with the State of Indiana, the Plaintiff was fully ready, willing and able to remove all of the items condemned and restore the land to a

condition as good as it was prior to the beginning of the original Lease in 1980. The State of Indiana would not allow the Plaintiff to do so.

20. The State of Indiana has provided no evidence whatsoever that it has any claim to ownership to any of the items condemned. At most, its claim could be construed as stating that the items condemned became the property of the United States of America pursuant to Section 14.03 of the Lease between Defendant as Lessor and Plaintiff as Lessee.

21. Plaintiff's Exhibit 13 makes clear that the United States Army Corps. of Engineers has no property inventoried which would include the marina at the Lick Fork site. The Corps of Engineer has made no claim to the items condemned. Nor has the State of Indiana shown any transfer to it of any rights that the United States of America has to the items condemned. The Lease between the United States of America as Lessor and the State of Indiana as Lessee specifically allows the Lessee to remove any improvements.

22. Further, it is clear that the items condemned which the Defendant, State of Indiana, claims to be its own without payment to the Plaintiff were removable prior to the end of the Lease. The State of Indiana forbade Plaintiff from removing any of the items condemned, and turned over those items in total to Plaintiff's competitor, Jeff Dukes.

23. According to the testimony of Chuck Pund, the items condemned could have been removed by Streicher Construction if Bernard W. Fallon had been permitted by the State to remove the items condemned.

Appendix E

24. The testimony of Douglas Hulsman clearly indicates that the electrical services could be removed by the Plaintiff before the end of its lease had the Defendant permitted removal.

25. The items condemned have value.

26. The Plaintiff was ready, willing and able to restore the premises to the condition it was at the beginning of the Lease, had Plaintiff been permitted by Defendant to do so.

27. The Defendant, State of Indiana, has clearly taken for its own use from the Plaintiff, without payment therefore, the following items: marina building, radio tower, birdhouse poles, wire propane pen, one gazebo, octagonal wood deck, landscaping, established concrete ramps and cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, and rip-rap (the "items condemned").

Upon these Findings of Facts, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. Defendant, State of Indiana, has the right to exercise the power of eminent domain for public use. Article 1, Section 21 of the *Constitution of the State of Indiana* reads as follows:

"No person's particular services shall be demanded,

without just compensation. No person's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

2. The constitutional reference to "No person's property" applies not only to land, but also to other interests in real estate and to personal property. *Williams v. State of Indiana*, (Ct. App. 1983) 444 N.E.2d 888 @ 890.

3. Property, in its constitutional sense, also includes personal property. *26 Am Jur* 172 @ 595. *Warner/Elektra/Atlantic Corp. v. County of DuPage*, (CA7 ILL) 991 F 2d 1280, reh. en banc, den (CA7 ILL) 1993 US App. LEXIS 13619.

4. The power of eminent domain extends to personal property in general. *26 Am Jur* 2d Section 108.

5. Indiana has special rules with respect to trade fixtures:

> "The Supreme Court of the United States, in the case of *VanNess v. Pacard*, 2 Pet. 137, 7 L. Ed. 374, used the following language: '"The general rule of the common law certainly is, that whatever is once annexed to the freehold, becomes part of it, and can not afterwards be removed, except by him who is entitled to the inheritance. The rule, however, never was * * * inflexible, and without exceptions. It was construed most strictly between executor and heir, in favor of the latter; more liberally, between tenant for life or in tail and remainderman or reversioner, in

favor of the former; and with much greater latitude, between landlord and tenant, in favor of the tenant. But an exception of a much broader cast, and whose origin may be traced almost as high as the rule itself, is of fixtures erected for the purposes of trade. Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant, during his term, and were deemed personalty, for many other purposes. * * * The question [whether fixtures erected for the purpose of trade, are or are not removable by the tenant] does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole question is, whether it is designed for purposes of trade or not.'" In that case the building in controversy was used partly as a residence and partly to carry on the trade of a carpenter and dairy. The house was two stories high, built upon a brick foundation which was imbedded in the soil, yet it was held that it was personal property and subject to be removed by the tenant at any time before the expiration of the leasehold.

"The intention of Miller in this case was to erect buildings, equip them with machinery, etc., for the purpose of carrying on his business. The intention of the appellee has much to do in determining the character and nature of the property. *McFarland v. Foley,* 27 Ind. App. 484.

"The rule declared in the VanNess case has been

adopted in this State. In *Cromie v. Hoover*, 40 Ind. 49, it was held that a tenant, who, for the better use and enjoyment of leased premises, erects buildings thereon, may, at any time before his right of enjoyment expires, remove the buildings. In a later case, it was held that where a tenant erects buildings on leased premises, for the better use or enjoyment of the same, he may remove them before the expiration of his tenancy, provided such removal can be accomplished without permanent injury to the freehold. Hedderich v. Smith, 103 Ind. 203, 53 Am. Rep. 509. The lease in this case contains no inhibition against the removal of any buildings which the lessee might erect on the leased premises, and there is not a word of evidence that, by their removal, the leased freehold would sustain any permanent injury."

Gordon v. Miller, (Ct. App., 1902) 28 Ind. App. 612 @ 616-617.

5. The plain reading of the lease agreement between plaintiff and defendant makes it clear that "All other property placed or erected on the leased real estate by the Lessee shall belong to Lessee." (Section 14.03 of Exhibit 1.) Any property that is not vested in the United States of America has become the property of the plaintiff. No written document in evidence and no testimony in this matter gives any ownership rights to the State of Indiana of the items condemned.

6. The State of Indiana has taken the items condemned from the plaintiff and has failed to compensate plaintiff for the taking.

Appendix E

JUDGMENT

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court, that the plaintiff have judgment determining an inverse condemnation of the items condemned by the State of Indiana has taken place.

As such, this matter shall proceed as if it were administered under I.C. 32-11-1, except as an inverse condemnation.

The Defendant, under I.C. 32-11-1-5 may appeal from the decision in the manner that appeals are taken from final judgments in civil actions.

SO ORDERED, this 8th day of October, 2001.

s/William E. Weikert
William E. Weikert
Judge, Dubois Circuit Court

Distribution to:

James C. Tucker, Esq.
Marcia Avery Hanley, Esq.

APPENDIX F - EXCERPTS FROM BRIEF OF APPELLEE TO THE COURT OF APPEALS OF INDIANA FILED AUGUST 5, 2004 AND PETITION TO TRANSFER TO THE SUPREME COURT OF INDIANA FILED JANUARY 21, 2005

COURT OF APPEALS OF INDIANA

No. 19A05-0312-CV-654

820 N.E. 2d 152

INDIANA DEPARTMENT OF NATURAL RESOURCES,
Appellant-Defendant,

v.

LICK FORK MARINA, INC.
Appellee-Plaintiff.

In *VanNess v. Pacard*, 2 Pet. 137, 7 L. Ed. 374, the United States Supreme Court held:

> Upon principles of public policy, and to encourage trade and manufactures, fixtures which were erected to carry on such business were allowed to be removed by the tenant, during his term, and were deemed personalty, for many other purposes. . . The question [whether fixtures erected for the purpose of trade, are or are not removable by the tenant] does not depend upon the form or size of the building, whether it has a brick foundation or not, or is one or two stories high, or has a brick or other chimney. The sole

question is, whether it is designed for purposes of trade or not. (Page 26 of *Brief of Appellee).*

INDIANA SUPREME COURT

NO. 19A05-0312-CV-00654
Lower Court Number:
19C01-0104-CP-152

2005 Ind. LEXIS 405

INDIANA DEPARTMENT OF NATURAL RESOURCES / STATE OF INDIANA
Appellant-Defendant,

v.

LICK FORK MARINA, INC.
Appellee-Plaintiff.

Petitioner again quoted the identical language on page 10 of the *Petition to Transfer* to the Indiana Supreme Court. *Id.*

APPENDIX G - COMPLAINT IN INVERSE CONDEMNATION IN THE DUBOIS CIRCUIT COURT FILED APRIL 19, 2001

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

COMPLAINT IN INVERSE CONDEMNATION

Plaintiff, Lick Fork Marina, Inc. (hereinafter referred to as "Lick Fork") by its counsel, for its complaint in inverse condemnation, states the following:

1. Defendant, State of Indiana, has the right to exercise the power of eminent domain for public use.

2. On April 29, 1980, Lick Fork and defendant through its Department of Natural Resources entered into a Lease Agreement, with exhibits attached thereto, a copy of which Lease Agreement is attached hereto, and made a part hereof, as Exhibit 1 with Exhibits A and B thereto.

3. Section 14.03 of Exhibit 1 reads as follows:
Title to Property. Title to any and all buildings,

> *structures and other improvements erected or placed on the Leased Real Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee.*

That Exhibit 1 provided for a ten year lease beginning April 29, 1980 and ending on April 28, 1990. The Lease also provided for extension thereof for two additional terms of five years each. The renewals occurred. The Lease was scheduled under its terms to expire the 28th day of April, 2000. After the 28th day of April, 2000, Exhibit 1 converted to a month-to-month tenancy under Section 2.04 and Lick Fork remained in possession until March 31, 2001.

4. During the term of the Lease, Lick Fork made numerous improvements to its leasehold. Included in those improvements were docks, above-ground tanks, temporary buildings such as storage trailers and sheds, mobile equipment, inventory and supply items. The State of Indiana concurred that those items were always and remain the property of Lick Fork.

5. However, during the course of the leasehold, Lick Fork further constructed on the leasehold a marina building, radio tower, birdhouse poles, wire propane pen, one gazebo, octagonal wood deck, landscaping, established concrete ramps and cement work, pads and stairs, utilities and accessories leading to various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, and rip-rap (hereinafter referred to as the "items

condemned"). Lick Fork paid for all of these and defendant, State of Indiana paid nothing for them.

6. Lick Fork paid property taxes on all of the items condemned. All in-ground fuel storage tanks were registered with the Indiana Department of Environmental Management as the property of Lick Fork, and not the State of Indiana.

7. In December, 1999, prior to the expiration of Exhibit 1 as extended, the defendant, State of Indiana made an offering to the public to make proposals on what was at that time the Lick Fork Marina. The State claimed that it had a right to offer as "available to the proposer" permanently constructed buildings, underground storage tanks and utilities, roads, parking lots and paving.

8. Ultimately, effective April 1, 2001, the defendant leased the real estate together with the items condemned to Hoosier Hills Marina, Inc. and/or Jeff Dukes and Shellie Dukes.

9. On October 9, 2000, the attorney for Lick Fork wrote Carrie Doehrmann, Chief of Staff and General Counsel for the Indiana Department of Natural Resources a letter by facsimile giving written notice to the defendant, State of Indiana, that the items condemned were the property of Lick Fork. A copy of the letter is attached hereto, made a part hereof as Exhibit 2.

10. On January 11, 2001, Bernard W. Fallon, President of Lick Fork Marina, Inc., and its attorney, James C. Tucker, met with John M. Davis, Deputy Director of the Department of Natural Resources and Gary Miller, Assistant Director of State Parks and Reservoirs.

11. Lick Fork, in the meeting of January 11, 2001,

made it clear to the representatives of the defendant that the items condemned had been paid for and erected by Lick Fork and were the property of Lick Fork. A letter of January 18, 2001, to John M. Davis from James C. Tucker, a copy of which is attached hereto as Exhibit 3, made clear that ownership.

12. On February 6, 2001, John M. Davis, Deputy Director of Indiana Department of Natural Resources, gave notice to Lick Fork to vacate the premises no later than March 31, 2001. In the letter, Mr. Davis stated: "All personal property is to be removed by that date; any personal property remaining thereafter shall become the property of the State of Indiana." The letter of February 6, 2001 is attached hereto made a part hereof and marked Exhibit 4.

13. On February 23, 2001, by a letter sent by facsimile by Carrie G. Doehrmann, Chief of Staff and General Counsel for the Indiana Department of Natural Resources to James C. Tucker on behalf of Lick Fork, a copy of which is attached hereto, made apart hereof, and marked Exhibit 5, the State of Indiana made it clear that the items condemned were considered by the State of Indiana to be the "property of the State of Indiana and are not to be removed."

14. On March 1, 2001, by facsimile, James C. Tucker as attorney for Lick Fork wrote Carrie G. Doehrmann, as representative of the defendant, in response, to indicate that the items condemned were the property of Lick Fork and that the action of the State of Indiana constitutes a condemnation of those items. A copy of the facsimile letter of March 1, 2001 is attached hereto, made a part hereof, and marked Exhibit 6.

WHEREFORE, Lick Fork prays that:

Appendix G

A. The Court enter an order of inverse condemnation and appoint appraisers as provided by law to access the damages which Lick Fork has sustained or is entitled to by reason of such inverse condemnation;

B. For payment to the Clerk of the Court the amount of damages so assessed; and,

C. The Court grant plaintiff all other proper relief.

Respectfully submitted,

TUCKER AND TUCKER, P.C.

s/James C. Tucker
James C. Tucker (901-59)
Attorney for Plaintiff
188 South Court Street
Paoli, IN 47454
812-723-2313

APPENDIX H- EXCERPTS OF LEASE AGREEMENT BETWEEN INDIANA DEPARTMENT OF NATURAL RESOURCES AND "LICK FORK MARINA, INC."

Section 2.01. Original Term. The "Original Term" of this Lease shall be for a period of ten (10) years, commencing on the *29th* day of *April,* 19*80* and ending on the *28th* day of *April*, 19*90.*

Section 2.02. Renewals. Lessor grants to Lessee options to extend the Original Term for two (2) additional terms of five (5) years each on the same terms and conditions as herein set forth; provided, however, that the facility has been maintained in a condition satisfactory to the Lessor, that the customer service has been of a quality satisfactory to the Lessor, and that Lessee is not in default in the performance of any of its obligations hereunder.

Section 3.02. Additional Rental. The Lessee shall pay to the Lessor an Additional Rental with respect to each year of the Accounting Term in the amount equal to two per cent (2%) of boat sales gross income, five per cent (5%) of boat rental gross income up to and including $100,000.00, and ten per cent (10%) of boat rental gross income in excess of $100,000.00, one per cent (1%) of gas sales gross income, and five per cent (5%) of all other miscellaneous gross income derived from the business operation conducted on the leased premises. All additional rental percentage rates shall be subject to renegotiation at the end of each five year period that the lease remains in effect.

Section 3.03. Gross Receipts. The term "Gross Receipts" as used herein shall e construed to include the entire amount of the actual sales or rental price, whether for cash or otherwise,

Appendix H

Section 3.03. (con't)
of all sales or rentals of merchandise and service, and all other receipts from all businesses conducted in or from the Demised Premises, including, but without limitation, boat rentals, equipment rental, rentals received for use of facilities in the Lease Real Estate, such as, lodging, mooring, and docking facilities, sales of gasoline, diesel fuel, lubricants, water and operating supplies, sewage pump-out, sales of merchandise (new or used), receipts from mail or telephone orders received or filled at the Leased Real Estate, all deposits not refunded to purchasers or equipment renters, orders taken, although such orders may be filled elsewhere, and sales by any subtenant, concessionaire, licensee, or person otherwise in the Leased Real Estate. If any one or more divisions of Lessee's business shall be sublet by Lessee or conducted by an person, firm or corporation other than Lessee, then there shall be included in Gross Receipts for the purpose of fixing the Additional Rental payable hereunder all the Gross Receipts of such division, whether such sales or rental of merchandise or service be made at the Leased Real Estate or elsewhere, in the same manner and with the same effect as if the business or sales or rentals of such divisions of Lessee's business had been conducted by Lessee itself. Deductions shall be allowed for uncollectible credit accounts or an addition to a reasonable reserve for bad debts. Gross Receipts shall not include however, (i) discounts and/or allowances made to customers, (or any sums collected and paid out for any sales or excise tax imposed by any duly constituted governmental authority,) (ii) the amount of returns to shippers or manufacturers, (iii) the amount of any cash or credit refunds made upon any sale or rental where the merchandise or service sold or rented or some part thereof is thereafter returned by the purchaser or renter and accepted by

Appendix H

Section 3.03. (con't)
the Lessee, (iv) sales of moveable or trade fixtures, and (v) any interest or carrying charges received with respect to sales of merchandise and service. Each charge or sale upon installment or credit shall be treated as a sale for the full price in the month during which such charge or sale shall be made, irrespective of the time when Tenant shall receive payment (whether full or partial) therefore. On coin operated devices, only the amount retained by the Tenant shall be recorded as a sale (as long as such devices provide only an incidental portion of Lessee's sales).

Section 12.01. Taking by Eminent Domain. If, during the Demised Term, the Leased Real Estate or any substantial portion thereof shall be taken as a result of the exercise of the power of eminent domain, this Lease shall terminate and each party shall look to the taking authority for compensation for any and all damage, loss or injury suffered as a result of such talking. . .

Section 14.03. Title to Property. Title to any and all buildings, structures and other improvements erected or placed on the Leased Real Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Lease Real Estate by the Lessee shall belong to the Lessee.

APPENDIX I - EXCERPTS OF DEPARTMENT OF THE ARMY LEASE FOR PUBLIC PARK AND RECREATIONAL AND FISH AND WILDLIFE MANAGEMENT PURPOSES PATOKA LAKE, INDIANA

Lease No. DACW-27-1-79-127

THE SECRETARY OF THE ARMY under authority of Section 4, of the Act of Congress approved 22 December 1944, as amended (16 USC 460d), and the Federal Water Project Recreation Act, Public Law 89-72, 79 Stat. 214 (16 USC 460L-13), and pursuant to a contract entered into on 26 October 1970 (hereinafter referred to as the Contract) by and between the United States of America (hereinafter referred to as the Government) and the State of Indiana (hereinafter referred to as the Lessee) hereby grants to the State of Indiana, Department of Natural Resources, a lease which shall take effect upon approval by the Secretary of the Army or his designee and shall remain in full force as long as the Government continues to operate the project, to use and occupy approximately 25,583 acres of land and water areas, which areas are under the primary jurisdiction of the Department of the Army in the project area, hereinafter referred to as the premises, as shown on attached Exhibit A.

If, however, this lease is revoked, the Lessee shall vacate the premises, remove its property therefrom, and restore the premises as aforesaid within such times as the Secretary of the Army may designate. . .

APPENDIX J - LETTER TO CARRIE DOEHRMANN, DEPARTMENT OF NATURAL RESOURCES, FROM JAMES C. TUCKER DATED OCTOBER 9, 2000

October 9, 2000

VIA FACSIMILE 317-233-6811

Ms. Carrie Doehrmann
Chief of Staff and General Counsel
Department of Natural Resources
State of Indiana
Indianapolis, IN 46202

RE: Lick Fork Marina

Dear Ms. Doehrmann:

On September 18, by facsimile transmission, I gave you some concerns about the proposal of Jeff Dukes. Please do confirm to me that you have satisfied yourself to the legality of the proposal submitted by Mr. Dukes. Please also affirm that the proposal by Mr. Dukes was sealed at all times after it was submitted to the department and it was correctly marked. Thank you for your cooperation. Also, could you please send me a copy of the Agenda for the October 25 meeting? I certainly appreciate your sending the September Agenda and would appreciate the October one as well.

No doubt, by now, you are familiar with the Lease Agreement originally entered into April 29, 1980 between Lick Fork Marina, Inc. and the Department of Natural

Resources of the State of Indiana. As you will recall, Section 14.03 reads as follows:

> *Title to Property. Title to any and all buildings, structures and other improvements erected or placed on the Leased Real Estate by the Lessee, which are so permanently fixed to the real estate as to become legally a part of the real estate is vested in the United States of America and is leased to the Lessor under the lease attached hereto and marked Exhibit A. All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee.*

Please also be aware that from the beginning, all improvements to the real estate have been considered not to be a part of the real estate. All have been assessed as improvements on leased land and all have been taxed. All fall within the definition of "All other property placed or erected on the Leased Real Estate by the Lessee shall belong to the Lessee." All, including the buildings, were erected for use in trade. The buildings may be removed without injury to the real estate. Under Gordon v. Miller (Ct. of App., 1901) 28 Ind. App. 612; 63 NE 774, all belong to the Lessee. The seminal case before the U.S. Supreme Court of VanNess v. Pacard 2 Pet. 137, 7 L.Ed. 374 is on point. The tenant was allowed to remove a two story house on a brick foundation.

I should also go on record as stating that part of your Prospectus concerning "The Offering" is absolutely not correct. The Prospectus states: "All current buildings and structures that are affixed to the property so as to be a part of the real estate are available to the proposer." This statement is not correct. As stated above, the definition in the Lease

Appendix J

Agreement with Lick Fork Marina, Inc. is not as the Prospectus states. If Lick Fork Marina, Inc. is the successful offeror, there is no problem. If Mr. Dukes is the successful offeror and Lick Fork Marina, Inc. enters into an agreement of sale, there is no problem. Otherwise, the improvements which can be removed without injury to the real estate will be removed by Lick Fork Marina, Inc. prior to the end of the month-to-month lease.

At issue is whether the Dukes have sufficient financial wherewithal to fulfill the obligations of their proposal if accepted by the Department of Natural Resources.

Bernie Fallon estimates a cost of approximately $12,000,000.00 to duplicate what Lick Fork Marina has provided.

The Prospectus and Statement of Intent prepared by the Department of Natural Resources which lead to the proposals states in part on page 15: "A statement identifying the principals who would participate in the proposed development and the nature and extent, or percentage, of each principal's interest in the development group. No unnamed partners are allowed. The DNR permits multiple partners, but, all partners are to be listed."

Statements made in the last meeting of the Commission indicate that Mr. Dukes may have additional partners involved in the development. Were those partners disclosed in the proposal? Or is Mr. Dukes now, based on the apparent willingness of the Department to support his proposal, adding to the proposal. This is quite important in light of the substantial investment that is required. You are

talking about the largest houseboat fleet for rental in the State of Indiana. You are talking about substantial improvements.

In the Agenda for the September meeting, it was stated: "Consideration of proposals to operate Lick Fork Marina at Patoka Lake." There will be no operating Lick Fork Marina except by Lick Fork Marina, Inc. Certainly the State may award the marina and houseboat concession on the Lick Fork of Patoka Lake to someone other than Lick Fork Marina, Inc. But the entity who receives the concession will not be operating Lick Fork Marina. It would be up to the entity to create and operate its own marina and not take improvements that are the property and assets of Lick Fork Marina, Inc.

Again, thank you for your consideration.

With best regards, I am,

Yours very truly,

s/James C. Tucker
James C. Tucker

ac

cc: Mr. Bernie Fallon

APPENDIX K - LETTER TO JOHN M. DAVIS, DEPARTMENT OF NATURAL RESOURCES, FROM JAMES C. TUCKER DATED JANUARY 18, 2001

January 18, 2001

Mr. John M. Davis
Assistant Director
Department of Natural Resources
402 W. Washington Street, Room WW255A
Indianapolis, IN 46024

RE: Lick Fork Marina, Inc.

Dear Mr. Davis:

Thank you very much for meeting with Bernie Fallon and me at Springs Mill Inn on January 11, 2001. Thank Gary Miller also for being present. I would have hoped to work through issues more completely, but it is quite helpful to sit down and talk with respect to disputes.

You made it clear that you disagree with the legal conclusions expressed in my facsimile of October 9, 2000 to Carrie Doehrmann, Chief of Staff and General Counsel, that the Fallon family had a right to remove buildings and other improvements installed by the Fallon family. Please be assured that Lick Fork Marina, Inc. and the Fallon family are of the opinion that those items of improvements which they placed on the premises are theirs, and may not be appropriated by the State of Indiana for the use of Mr. Dukes during the next ten years.

Appendix K

As I understood your timetable, it would be 60-90 days before transition would take place. That will give time for the Fallons to remove the various improvements. Based on the statements you made at the meeting, and the offering that was originally presented in writing, the DNR agrees that existing docks, above-ground tanks, temporary buildings such as storage trailers and sheds, mobile equipment, inventory and supply items may be removed by the Fallons without objection.

As to the marina building, radio tower, bird house poles, landscaping, wire propane pen, two gazebos, octagonal wood deck, ramps and utilities and accessories leading to the various docks, in-ground fuel storage with all attachments, mechanical in-ground improvements, utility lines, exterior rip-rap and other improvements, please specifically, in writing, give us the opinion of the Indiana Department of Natural Resources as to ownership. If the State claims these items, then it must pay for them, their fair value. Under both the Constitution of the State of Indiana and the Constitution of the United States, no person's property can be taken for a public purpose without just compensation.

As was stated at the meeting, the Fallons claim nothing that was constructed by the State of Indiana, at all, including, but without limitation to the shower building.

An issue discussed at the meeting was the responsibility concerning ice. Ice is created by God and not by Lick Fork Marina, Inc. Because of that, a dockage license agreement is entered into by those who use the facility and Lick Fork Marina, Inc. A part of that agreement, which we shared with you, reads: "The Licensee hereby waives all right to hold the

Appendix K

Licensor liable for any and all damage to his property moored in the Harbor arising from any cause whatsoever, including but not limited to any act of, or a combination of, the following: fire, theft, riot, vandalism, wind, storm, flood or ice." It is good business to assist people who have water craft moored as they fight ice, but it is not a requirement of the lease agreement between the Indiana Department of Natural Resources and Lick Fork Marina, Inc.

The bottom line is that the State certainly has the right to allow whomever it chooses to operate a marina at Lick Fork of Patoka Lake. If the State chooses Glen Dukes, then the Fallon family has a right to remove the improvements that it installed, for so long as it restores the real estate to the condition it was before it began its lease. In the event the State wishes to acquire by inverse condemnation or direct condemnation the assets of the Fallon family it must pay for them. The price we placed on those items (not including existing docks, above ground tanks, temporary buildings such as storage trailers and sheds, mobile equipment, inventory and supply items) is $600.000.

With best regards, I am,

Yours very truly,

s/James C. Tucker
James C. Tucker

ac

cc: Mr. Bernard Fallon

APPENDIX L - LETTER TO BERNARD W. FALLON FROM JOHN DAVIS, DEPUTY DIRECTOR AT INDIANA DEPARTMENT OF NATURAL RESOURCES DATED FEBRUARY 6, 2001

February 6, 2001

Bernard W. Fallon
Lick Fork Marina, Inc.
10306 E. Lick Fork Marina Road
Celestine, Indiana 47521

RE: Lick Fork Marina, Inc.
Notice to Vacate

Dear Mr. Fallon:

As Resident Agent for Lick Fork Marina, Inc., we are providing you with this Notice to Vacate. The month-to-month lease with the State of Indiana is hereby terminated and the premises at Patoka Lake are to be vacated no later than March 31, 2001. All personal property is to be removed by that date; any personal property remaining thereafter shall become the property of the State of Indiana.

Sincerely,

s/John Davis
John Davis
Deputy Director

APPENDIX M - LETTER TO JAMES C. TUCKER FROM CARRIE G. DOEHRMANN, INDIANA DEPARTMENT OF NATURAL RESOURCES, DATED FEBRUARY 23, 2001

Sent via Facsimile

February 23, 2001

James C. Tucker
Tucker and Tucker, P.C.
188 South Court St.
Paoli, IN 47454

Dear Mr. Tucker,

In response to your January 18, 2001 correspondence to John Davis, please be advised that it is our opinion that the marina building, landscaping, concrete ramps or cement work, pads and stairs, utilities and accessories leading to the various docks, in-ground fuel storage with all attachments, utility lines and rip-rap are not personal property and as such are property of the State of Indiana and are not to be removed.

As part of the transition, please have your client produce a list or an accounting of current slip holders, seasonal slips holders, and buoy renters. This list should include name, address and phone number of such holders or renters. Please also provide an accounting of these holder's or renter's payment status. This information must be produced to me, on behalf of my client, on or before March 5, 2001. We are making this request because it has come to our attention that your client may be entering into slip hold or other rental

agreements beyond the term of his tenancy. Any such agreements or relationships entered into by your client are in violation of his status as a terminated lessee.

As I indicated to you yesterday during our telephone conversation, my client is holding firm to their commitment that your client vacate the leased premises on or before March 31, 2001. I am also aware that you and your client are engaged in ongoing negotiations with Mr. Dukes regarding possible sale of the existing docks. In the event that negotiation fails, I am renewing DNR's offer to lease the existing docks for a period not exceeding 120 days from April 1, 2001. Consideration for this lease is that DNR will remove the docks from their existing location and transport them to your client's property adjacent to the current leased premises. Please be informed that this offer by my client terminates on March 5, 2001. In the event that there is not agreement between your client and Mr. Dukes or your client and the DNR concerning the docks, then the docks and all other personal property must be removed on or before March 31, 2001.

Please contact me at my direct number (317)232-4027 regarding questions you may have.

Sincerely,

s/ Carrie G. Doehrmann
Carrie G. Doehrmann
General Counsel and Chief of Staff

APPENDIX N - LETTER TO CARRIE G. DOEHRMANN, DEPARTMENT OF NATURAL RESOURCES FROM JAMES C. TUCKER, DATED MARCH 1, 2001

March 1, 2001

VIA FACSIMILE 317-233-6811

Ms. Carrie G. Doehrmann
Chief of Staff and General Counsel
Department of Natural Resources
State of Indiana
Indianapolis, IN 46202

RE: Lick Fork Marina

Dear Ms. Doehrmann:

Reference is made to your facsimile to me of February 23, 2001. I am not surprised by your correspondence, but certainly am disappointed. As I stated to you in my facsimile of October 9, 2000, to which you have only replied in February of 2001, Lick Fork Marina, Inc. and the Fallon family are the owners of those items you claim to be owned by the State of Indiana, including the marina building, landscaping, concrete ramps or cement work, pads and stairs, utilities and accessories leading to the various docks, in-ground fuel storage with all attachments, utility lines and rip-rap. The Fallons paid for all of those and the State paid nothing. Article I, Section 21 of the Constitution of the State of Indiana prohibits the taking unless just compensation is paid.

Appendix N

Of particular concern to me is the fact that Lick Fork Marina, Inc. is the owner of the underground storage tanks. There are two 9,000 gallon tanks with all attachments. The Indiana Department of Environmental Management and the Indiana law both recognize Lick Fork Marina, Inc. as the owner and responsible for any environmental concerns pertaining to them. Now your letter says that after all this time the State is the owner and apparently has been during the period of time that the Fallons were paying all the permits, fees, taxes and insurance. The Fallons have paid the property taxes, as well. But I understand your letter that the State is exercising its power to take these items from the Fallon family. I do have legal recourse in Court concerning establishing just compensation. But please be more specific. In addition to taking the underground storage tanks, contrary to the State law, are you also saying that you are taking the pumps? The Fallons are in the process of having the tanks closed as required by law. The closure is scheduled March 8, 2001. Soil samples have already been completed and the results are forthcoming. Based on the information we have, there will be no environmental problem, whatsoever. But the State will be responsible from the point in time that it confiscates the Fallons property.

Specifically, then we need to know whether the State is going to purchase the petroleum products that are within the tanks or are the Fallons to pump this out of their tanks in to some other containers. They will have an expense for purchasing the containers as well.

Bernie Fallon will comply with your request concerning accounting for the current slip holders, seasonal slip holders and buoy renters under separate cover. Please understand that

this arbitrary and capricious action on behalf of the State with respect to removing the Fallons by March 31 comes at a time when Marsha Fallon is due to have the Fallon's second child. The Fallons have lived on the premises for twenty-one years in order to provide the type of on-site coverage that one would expect to occur.

With respect to your March 31 termination date, if the Fallons are to keep that date, it is certainly up to two factors, the State of Indiana and weather conditions. First, the State must immediately notify all customers of the transition and the removal of the docks by March 31. Second, the State must remove the customers' boats from the slips by March 15 so that the docks may then be removed by March 31. If the State has not removed the boats from the slips then it would be impossible for the docks to be removed. Further, the period of 16 days for removal is feasible but only if weather conditions during those 16 days are good. If the weather conditions are not good then it will take longer. That 16 day period can only begin at the time the State of Indiana has removed all of the boats from the slips.

On the other hand, there is some interest in the Fallons with respect to allowing the State to lease the docks. When we talked on the telephone you said 60 to 90 days, not 120 days. Giving you the longer period that you originally desired, 90 days, is agreeable. Please understand that the State would have the risk of loss beginning one second after Midnight of March 31. That risk of loss would be for everything. The State would have the obligation then at the conclusion of the lease period to have all docks including bridges, header piers and the slips, gas decks, cables and anchoring and all related personal property moved up to the

adjacent Fallon real estate. In addition there is a linen storage building which is used for cleaning supplies which your concessionaire will need and you may have that as part of the lease for so long as the linen storage building is also taken at the conclusion of the lease to the Fallon property. All items should be in the same condition as at the beginning of the dock lease, ordinary wear and tear excluded, when put on the Fallon real estate. Please understand that the State is responsible through insurance or otherwise for everything during the period of the lease. If you want an extension past the 90 days, then for any month thereafter or part thereof, there would be a $10,000.00 per month charge to the State for you to keep on leasing the docks and appurtenances.

If the State leases the docks, the rental houseboat fleet of the Fallons would have the right to continue to be in operation and use the docks for so long as the State rented the docks from the Fallons. There would be no charge to the Fallons for this. That is not to say that they would have anymore opportunities or rights than the Fallons have now with respect to the houseboats only, but the houseboats could continue to be utilized and moored at the docks. The gas docks would be a part of the rental.

Please respond by March 5 concerning the State's intentions.

With best regards, I am,

Yours very truly,

s/James C. Tucker
James C. Tucker

APPENDIX O - EXCERPTS OF TRANSCRIPT OF BENCH TRIAL HELD AUGUST 30, 2001, IN DUBOIS CIRCUIT COURT

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

BE IT REMEMBERED, that on the 30th day of August, 2001, in the Dubois Circuit Court, Dubois County, Jasper, Indiana, the following proceedings were had in the above-entitled cause of action before the Honorable William E. Weikert, Judge of said Court, to-wit:

APPEARANCES

James C. Tucker
Jennifer A. Tucker
188 South Court Street
Paoli, IN 47454
On behalf of the Plaintiff

Marcia Avery Hanley
Deputy Attorney General
402 West Washington Street
Indianapolis, IN 46204
On behalf of Defendant

Appendix O

OPENING STATEMENT OF JAMES C. TUCKER

Page 5, lines 1-11

. . .Those folks, the Dukes, are using property that was placed, erected, paid for, money and sweat by the Fallon family over a period of twenty-one years. Very early on in that process of initiating proposals, it was clear that the State favored not renewing with the Fallon family, but letting someone else have it. So it was also brought to the attention of the State of Indiana that under the terms and conditions of the lease as written that the items of property that were installed by the Fallon family were theirs. That the State of Indiana which paid absolutely not one cent for any of it could not take it from the Fallon family without giving them just compensation. Of course, that's a part of the Constitution of the State of Indiana, Article 1 Section 21, as well as the United States Constitution.

Page 6, lines 7-24

. . . There's an old case and I've cited it in these letters. When you get a chance to real them, you'll see it. It's a United States Supreme Court case that's been adopted in Indiana with respect to trade fixtures; and it clearly says, and in that case it involved a house that was two stories high built on a brick foundation imbedded in the soil, that it was considered personal property and could have been removed was the owner of the . . had the ownership of the lessee and the lessee could remove it before the end, which is what we ask in those letters as you'll see, the right to remove those items. And the State said no, you must not. This property is the State of Indiana's property and you may not remove it. Read the letters. You'll see it's absolutely clear. So the State took this property and what they claimed in the letters that

were exchanged is that this is real property. It's been affixed to the real estate and it is not owned by the Fallons. We see, however, in the evidenced to the Court today that if it were to be considered a part of the real estate so permanently affixed to the real estate as to become legally a part of the real estate, title would vest in the United States of America. They don't wan--. . they don't claim it. . .

Page 7, lines 24-25; Page 8, Lines 1 - 7
. . . We'll prove that have no right to any of it and we'll prove to the Court that the Fallon family is entitled to just compensation and ask the Court to determine that that is the circumstance here under the Constitution of the State of Indiana and the United States of America and appoint three disinterested appraisers to appraise the value of the property that was taken from the Fallons and it's quite clear that personal property is the subject matter also of the Constitutional protections against the . . . a . . . a taking by the State without just compensation. . .

APPENDIX P - CHRONOLOGICAL CASE SUMMARY FROM DUBOIS CIRCUIT COURT FROM 4/19/01 TO 11/26/03

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

* *

4/19/01	Plff, by counsel, files Complaint in Inverse Condemnation, together with Notice of Hearing assigned for Aug. 30/01 at 9:00 a.m. Service upon Larry D. Macklin, Director, Department of Natural Resources, and Steve Carter, Attorney General, by certified mail.
4/30/01	Return of Service: Service made on Attorney General on 4/25/01 by certified mail.
5/03/01	Return of Service: Service made on Dept. of Natural Resources on 4/26/01 by certified mail.
5/16/01	Deft, State of Indiana, by counsel, files Motion for Enlargement of Time. Motion granted. The

Appendix P

State of Indiana shall have to and including June 14/01 in which to file a response. (Entry signed 5/22/01)

6/14/01 Deft, Indiana Dept. of Natural Resources, by counsel, files Answer and Affirmative Defenses, together with Praecipe for filing by certified mail.

8/30/01 Plaintiff appears by counsel, J. C. Tucker; Deft appears by counsel, Marcia Hanley. Court holds hearing on Complaint for Inverse Condemnation. Court, having heard evidence, now orders the parties to prepare Proposed Findings of Fact and Conclusions of Law to be submitted to the Court within twenty (20) days. Court will issue its Findings within fourteen days from submission of Proposed Findings.

9/11/01 Plff, by counsel, files Proposed Findings of Fact and Conclusions of Law and Judgment.

9/21/01 Deft, by counsel, Marcia Hanley, and orally requests the Court for an Extension of Time to Submit Proposed Findings of Fact. Court grants extension of time until Sept 25/01.

9/26/01 State of Indiana, Dept. of Natural Resources, by Counsel, submits Proposed Findings of Fact, Conclusions of Law, and Judgment.

10/08/01 The Court, having had this matter under

advisement enters Findings of Fact, Conclusions of Law, and Judgment. (Entry)
- - The Court assigns this matter for Pretrial conference (by telephone) on Nov. 2 6/01 at 11:30 a.m.

11/26/01 Court holds telephone conference with Atty Tucker and Atty Hanley. The State of Indiana shall have until Nov. 30/01 in which to file a Motion to Reconsider; Plff shall have a reasonable period of time to respond to same; Counsel shall have thirty days from this date in which to submit Proposed Instructions for Appraisers; and parties may submit, by correspondence, any recommendation as to appraisers. (Notice to Atty Tucker and Atty Hanley)

11/30/01 Deft, State of Indiana, files Motion to Reconsider

12/14/01 Plff, by Counsel, files the following proposed documents: Appointment of Appraisers; Instructions to Appraisers; Oath of Appraisers; and Report of Appraisers.

12/19/01 Plff, by counsel, files Response to Motion to Reconsider.

1/09/02 The Court, being duly advised, enters an Order Denying Deft's Motion to Reconsider. (Entry)

2/11/02 Court enters Order on Appointment

Appendix P

Appraisers. The Court appoints the following: Doug Lukemeyer; Dan Hoffman; and Gene Thieman. The Appraisers are to report to this Court on Feb. 25/02 at 11:30 a.m. for instructions. (Entry)

2/25/02 Appraisers Gene Thieman, Douglas Lukemeyer and Daniel C. Hoffman appear. Court instructs the Appraisers and Oath of Appraisers is signed by each appraiser. (Copies of Oath of Appraisers, Instructions, Order on Appointment of Appraisers forwarded to James C. Tucker and Office of the Attorney General)

4/15/02 The Court assigns this matter for hearing on April 25/02 at 1:30 p.m. Appraisers to appear at that time. (Entry)

4/25/02 All three (3) appraisers appear in person; Plff Appears by Bernie Fallon. Court holds meeting with appraisers regarding their request to withdraw as appraisers. Court takes their request under advisement.

- - Marcia Hanley Appears on behalf of the Deft, and is advised of the discussion with appraisers.

- - Court, being duly advised, now finds as follows: the three (3) appraisers are excused from this cause of action. The parties are given ten (10) days to submit to the Court their recommendations for appraisers. (Notice)

5/03/02 Plff, by counsel, files Suggestions of

Appendix P

Appraisers.

5/06/02 Deft, State of Indiana, files Suggestion of Appraisers.

5/15/02 The Court enters an Order appointing the following appraisers: Charles Pund; Doug Hulsman; and Berry Fry. (Entry)
- - the appraisers are to report to this Court for instructions on May 28/02 at 1:30 p.m.

5/28/02 Bernie Fallon appears; Charles Pund, Doug Hulsman and Berry Fry, appear. Mr. Frye advises he will not be able to begin this project for eight (8) weeks. However, he would be willing to participate. Both Mr. Pund and Mr. Hulsman agree to be appointed. Court now vacates this hearing and will contact Mr. Warner to see if he would be available and when he can start. The Court vacates the hearing this date and will reassign once another appraiser has been chosen.

5/30/02 The Court enters an Amended Order appointing the following appraisers: Charles Pund; Doug Hulsman; and Stephen Woerner. Appraisers are to report to this Court on June 10/02 at 1:30 p.m. for instructions. (Entry)

6/10/02 Douglas J. Hulsman, Charles L. Pund, Steven R. Woerner appear in person; Bernie Fallon, Plff, appears in person and without counsel. Court issues instructions to appraisers and they

	accept appointment. This matter is assigned for review hearing to check progress on July 9/2002 at 1:30 p.m. -- Court enters Written Oath of Appraisers. -- Court Enters Written Order on Appointment of Appraisers. (Entry)
6/27/02	Report of Appraisers is filed.
7/17/02	Deft, by Counsel, files Exceptions and Demand for Jury Trial.
7/30/02	The Court assigns this matter for Pretrial Conference (by telephone) on Aug. 12/02 at 1:30 p.m. (Counsel for Plff to initiate call) (Notice to Atty Hanley and Atty Tucker)
8/12/02	Telephone Pretrial Conference is held with Atty Tucker and Atty Hanley. This matter is assigned for Trial by Jury on March 24/03 at 9:00 a.m. (3 days)
8/26/02	Court enters a written Pretrial Order. (Entry)
8/30/02	Plff, by Counsel, files List of Witnesses and Exhibits.
9/13/02	Deft, by Counsel, files Witness and Exhibit List.
10/30/02	Court is in receipt of past due notice from S. R. Woerner Company.

Appendix P

11/15/02	Deft, by counsel, files Witness and Exhibit List.
1/13/03	Deft, by Counsel, files Motion for Enlargement of Time to Complete Discovery. Motion granted. Deft is given to and including Feb. 19/03 in which to complete same. (Entry signed 1/15/03)
2/05/03	The Court notes that counsel is not available for Settlement Conference on this date. The final pretrial is confirmed for Feb. 28/03 at 11:00 a.m. (Counsel to advise Court of status of any possible settlement) (Notice to Atty Tucker and Atty Hanley)
2/12/03	Plff, by counsel, files Tender of Preliminary and Final Instructions.
2/28/03	Plff appears by counsel, James C. Tucker; Deft appears by counsel, Marcia Avery Hanley. Parties advise the Court that discovery has not yet been completed. However, parties confirm the jury trial assigned on March 24/03 at 9:00 a.m. reserving at least two days on the Court's calendar. Telephonic Final Pretrial Hearing is assigned on March 14/03 at 11:00 a.m. (Court to initiate the call)
2/28/03	- - Deft, by counsel, files Proposed Jury Instructions. - - Deft, by counsel, files Statement of Issues. (Copies mailed to Counsel for Deft and

counsel for Plff)

3/14/03 Counsel, Atty Tucker and Atty Hanley, by phone, hold Pretrial Conference. State will be filing a written Motion for Continuance of the Jury Trial scheduled for March 24/03 and the Court has verbally granted same, over the objection of the Plff. This matter is reassigned for trial by jury on Aug. 20/2003 at 9:00 a.m., for three (3) days. Parties shall complete all discovery on or before May 14/2003. This matter is assigned for Final Pretrial Conference on Aug. 6/2003 at 11:30 a.m., by telephone, with the Court to initiate call.

8/06/03 Telephonic Pretrial Conference is held with James C. Tucker, counsel for Plff; and Marcia Avery Hanley, counsel for Deft. Parties confirm the jury trial assigned on Aug 20/03 at 9:00 a.m. for three days. Parties are ordered to submit any Motions in Limine on or before Aug 13/03. The State is to confirm with the Court and the Plff whether it will agree to submit the case to fewer than a six person jury if that becomes necessary. Parties have complied with Paragraph 6 of the Court's Pre-trial Order.

8/13/03 Deft, by counsel, files Motion for Separation of Witnesses. Motion granted. (Entry signed 8/18/03)

8/20/03 Plff appears by Bernie Fallon and by counsel,

Appendix P

James C. Tucker; Deft appears by counsel, Marcia Avery-Hanley; this being the date assigned for Trial by Jury. Court has previously granted Deft's Motion for Separation of Witnesses. Jury panel is sworn to truthfully answer all questions put to them concerning their qualifications as jurors and Voir Dire is commenced. The parties state to the Court that they accept a jury consisting of the following persons: Alan Demaegd, Marsha Ann Stallings, Darrel L. Cox, Ted C. McAninch, Steven G. Kempf and Lillian Louise Parks. Preliminary Instructions are read to the Jury. Opening statements are presented. Plff begins its case in chief. Charles Pund is on the witness stand, and Atty Tucker is continuing it's direct examination. Further hearing in this cause is continued to Aug 21/03 at 8:00 a.m.

8/21/03 Plff appears by Bernie Fallon and by counsel, James C. Tucker; Deft appears by counsel, Marcia Avery Hanley. Trial by Jury continues. Plff continues its case in chief. Plff rests. Further hearing in this cause is assigned for Aug. 22, 2003, at 8:00 a.m.

8/22/03 Plff appears by Bernie Fallon and by counsel, James C. Tucker; Deft appears by counsel, Marcia Avery Hanley and Janet Parsanko. Trial by Jury continues. State begins its case in chief. State rests. No rebuttal testimony is presented. Evidence portion is concluded. Final

Appendix P

Instructions are settled. Final arguments are presented to the Jury, and Final Instructions are read to the Jury. Jury Bailiff is sworn and Jury is instructed to commence deliberation. --The Jury now comes into open Court and advises they have reached a verdict, by Foreperson, Marsha Stallings. The Jury finds in favor of the Plff, and assess its damages in the amount of $432,600.00, with interest to be computed by the Court. The cost of restoring the Defendant's land to its original condition after the described personal property has been removed is $2,000.00. Court enters judgment in favor of the Plff and against the Deft. (Atty Tucker to prepare Entry).

8/25/03 Court Reporter's Note: Exhibits from the Jury Trial are in the Exhibit Closet.

9/08/03 Court enters Judgment on Jury Verdict from Aug. 22/03. (Entry)

9/22/03 Deft, Indiana Dept. of Natural Resources, by Counsel, files Motion to Correct Errors, together with -- Brief in Support Thereof.

9/30/03 The Court assigns this matter for hearing on Oct. 20/03 at 3:00 p.m. (Notice to Atty Tucker and Atty Hanley)

10/02/03 Plff, by Counsel, files Response to Motion to Correct Error.

Appendix P

10/08/03	Plff, by Counsel, Files Corrected Plff's Response to Motion to Correct Error.
10/20/03	Plff appears, by Bernard Fallon, and by counsel, J.C. Tucker; Deft appears by counsel, Marsha Hanley. Court holds hearing on the Deft's Motion to Correct Errors. Court, having heard oral argument, now takes this matter under advisement. Court further takes State's Exhibits 1 & 2 under advisement.
10/23/03	Deft, by counsel, files Supplement to Brief in Support of Motion to Correct Error submitted in response to the Trial Court's inquiry during the hearing conducted on October 20, 2003.
10/23/03	Deft, by counsel, files Supplement to Brief in Support of Motion to Correct Error submitted in response to the Trial Court's inquiry during the hearing conducted on Oct. 20/03.
10/31/03	The Court, being duly advised, enters an Order Finding that the Motion to Correct Error of Indiana Department of Natural Resources is denied. (Entry)
11/03/03	Plff, by counsel, files Response to Deft's Supplement to Brief in Support of Motion to Correct Error.
11/26/03	State, by its Pros. Atty., files Notice of Appeal.

APPENDIX Q - DEFENDANT'S SUGGESTIONS OF APPRAISERS

May 3, 2002

The Honorable William E. Weikert
Judge, Dubois Circuit Court
One Courthouse Square
Jasper, IN 47546

Re: *Lick Fork Marina, Inc. v. State of Indiana*

Cause No. 19C01-0104-CP-0152

Dear Judge Weikert:

The State of Indiana nominates Berry Kent Fry (812) 536-3306 and Steven R. Woerner (812) 354-3323 as court-appointed appraisers in the above mentioned case. Both Mr. Fry and Mr. Woerner are Certified General Appraisers in Dubois County. Mr. Fry does have other appraisal commitments and is willing to take this assignment if appointed by the court, however, he cannot appraise the personal property in this case until the latter part of June, 2002. If the other side does not object to slight delay in the appraisal, then the State of course would be in agreement.

Companies who could be considered in addition to the appraisers are K&W PV Fence Company, Earl Wagner is a contact person and the telephone is (812) 486-7854 and Lindsey Construction whose telephone is (812) 938-9670, both of these companies are likewise located in Dubois

Appendix Q

County. If this Office can provide additional assistance to this Court involving the above mentioned case, please let me know. My direct telephone and voicemail is (317) 232-6317. Thank you.

Sincerely,
s/Marcia Avery Hanley
Deputy Attorney General

cc: J. C. Tucker
John Davis
Carrie Doehrmann
Marian England

APPENDIX R - ORDER ON APPOINTMENT OF APPRAISERS IN DUBOIS CIRCUIT COURT FILED JUNE 10, 2002

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.
Cause No. 19C01-0104-CP-0152

ORDER ON APPOINTMENT OF APPRAISERS

The Court, having reviewed the record of this cause and being duly advised, now finds as follows:

1. The plaintiff, Lick Fork Marina, Inc., filed its "Complaint in Inverse Condemnation" in this cause on April 19, 2001.

2. The defendant, State of Indiana, has appeared by counsel in this cause.

3. The Court has jurisdiction over the subject matter of this cause and the parties named herein.

4. On October 8, 2001, the Court issued its "Findings of Fact and Conclusions of Law and Judgment", ruling

that state action had resulted in an inverse condemnation.

5. On November 30, 2001, the State of Indiana filed its Motion to Reconsider.

6. On January 9, 2002, the Court denied the defendant's Motion to Reconsider.

7. The plaintiff is therefore entitled to compensation based on the "fair market value" of the appropriated items of personal property: Marina building, landscaping, concrete ramps or cement work, pads and stairs, utilities and accessories leading to the various docks, in-ground fuel tanks with all attachments, utility lines, and rip-rap, minus the cost of removing them from the defendant's land and the cost of restoring the defendant's land to its original condition.

8. The Court should now appoint and instruct three disinterested freeholders of Dubois County, Indiana, to assess the total amount of just compensation due the plaintiff for the inverse condemnation of the above described personal property.

IT IS THEREFORE ORDERED, that Douglas J. Hulsman, Charles L. Pund and Steven R. Woerner, three disinterested freeholders of Dubois County, Indiana, are now appointed to assess the total amount of just compensation due the plaintiff in this cause; that these three freeholder-s shall meet in the Dubois Circuit Court on the 10th day of June, 2002, at 1:30 p.m., and after being duly sworn and instructed by the court, shall proceed in a body to view the personal

property described above; and that these freeholders shall jointly prepare and file one written report as to the total amount of just compensation due the plaintiff with the Clerk of this Court on or before the *9th* day of *July*, 2002.

IT IS FURTHER ORDERED, that the Clerk of this Court shall issue a copy of this "Order on Appointment of Appraisers" to the plaintiff, the defendant, and the attorneys of record in this cause; and that the Clerk shall send notice of the "Report of Appraisers" filed in this cause, to the plaintiff, the defendant, and the attorneys of record by U.S. certified mail.

IT IS SO ORDERED this 10th day of June, 2002.

s/William E. Weikert
William E. Weikert
Judge, Dubois Circuit Court

Distribution to:
James C. Tucker, Esq.
Marcia Avery Hanley, Esq.

APPENDIX S - REPORT OF APPRAISERS IN DUBOIS CIRCUIT COURT FILED JUNE 27, 2002

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

REPORT OF APPRAISERS

The undersigned appraisers, being duly appointed, sworn, and instructed by the Court, have honestly, fairly and impartially assessed the total amount of just compensation due the Plaintiff in this cause to be as follows:

1. On March 31, 2001, the "fair market value" of the personal property taken by the Defendant in the cause was FOUR HUNDRED SEVEN THOUSAND FOUR HUNDRED Dollars ($407,400), which is broken down as follows:

a. marina building @ $146,100
b. landscaping @ $19,900
c. concrete parking lot @ $30,300
d. concrete ramps and stairs @ $94,600
e. utilities and accessories leading to various docks @ $24,800

f. in-ground fuel tanks with all attachments @ $32,700
g. water tap and utility lines @ $27,300
h. rip-rap and gravel parking/drives @ $21,300
i. gazebo and deck @ $10,400

2. The cost to remove the described personal property from the Defendant's land is THIRTY THOUSAND TWO HUNDRED Dollars ($30,200) which is broken down as follows:

a. marina building @ $7,500
b. landscaping @ (included with marina building)
c. concrete parking lot @ $4,160
d. concrete ramps and stairs @ $2,680
e. utilities and accessories leading to various docks @ $1,800
f. in-ground fuel tanks with all attachments @ $2,160
g. water tap and utility lines @ $5,500
h. rip-rap and gravel parking/drives @ $6,400
i. gazebo and deck @ (included with marina building)

3. The cost of restoring the Defendant's land to its original condition after the described personal property has been removed is TWO THOUSAND FOUR HUNDRED Dollars ($2,400).

4. Total just compensation, which is the "fair market value" of the described personal property items minus the cost to remove them from the Defendant's land and the cost of restoring the Defendant's land to its original condition is:

Appendix S

THREE HUNDRED SEVENTY-FOUR THOUSAND EIGHT HUNDRED Dollars ($374,800).

Dated: *27 June 2002*

s/Charles L. Pund
s/Douglas Hulsman
s/Steven R. Woerner

APPENDIX T - EXCERPTS OF WITNESSES' TESTIMONY AT BENCH TRIAL HELD AUGUST 30, 2001 IN DUBOIS CIRCUIT COURT

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

PLAINTIFF'S WITNESS - ALLEN THEWES (DIRECT)

Page 14, Lines 19-21
Q. Okay, Did you assess . . at that location did you make assessment of what was there to Lick Fork Marina, Inc. so that they'd pay their fair share of personal and real property taxes.

Page 14, Line 22
A. Yes

Page 14, Line 23
Q. Did it end up being all personal property taxes, Mr. Thewes?

Page 14, Lines 24-25
A. No. There was some real estate also. I also found here

in '94 . . uh . . dock building materials for $85,000 and building addition $107,000.

Q. And how were they characterized?

Page 15, Lines 2-4

A. This was addition to building plus . . uh . . this is . . uh . . I suppose . . see it was his accountant who filled this out. So it would . . it is on as personal property.

PLAINTIFF'S WITNESS, ALLEN THEWES (RE-DIRECT)

Page 22, Lines 7-8

Q. And in addition would there be personal property that was taxed to Lick Fork Marina?

Page 22, Line 9

A. Pers--. . personal property taxed to it every year. Yes.

Page 22, Line 10

Q. That year and every other year.

Page 22, Line 11

A. Every year. Yeah.

PLAINTIFF'S WITNESS, BERNARD WILLIAM JOSEPH FALLON (DIRECT)

Page 27, Line 2

Q. But who runs the marina that's located there?

Page 27, Line 3

Appendix T

A. Uh . . another person, Mr. Jeff and Shelly Dukes.

Page 27, Line 4
Q. Now, when did that change?

Page 27, Line 5
A. March 31, 2001.

Page 29, Lines 22-23
Q. With respect to the improvements that we're talking about here, did the State of Indiana pay you any money for any of it?

Page 29, Line 24
A. None whatsoever.

Page 29, Line 25
Q. Was all the funds that were expended funds that were raised by the Fallon family and Lick Fork Marina, Inc.?

Page 30, Line 2
A. Yes, sir. That's correct.

Page 36, Lines 20-21
Q. That . . that . . we're making no claim for that because the State said that Lick Fork Marina owns that. Is that correct?

Page 36, Line 22
A. I understand that's correct, sir.

Page 38, Line 6
Q. Have you met with Gary Miller?

Appendix T

Page 38, Line 7
A. Yes, sir, I have.

Page 38, Line 8
Q. What is Mr. Miller's position?

Page 38, Line 9
A. He understands it very clearly.

Page 38, Line 10
Q. No. No. What . . his office . . I . .

Page 38, Line 11
A. Okay.

Page 38, Line 12
Q. I didn't make it clear to you my question. What's his title?

Page 38, Line 13
A. Okay. He is the Assistant Director of the Department of Natural Resources.

Page 38, Line 14
Q. And what's his responsibilities?

Page 38, Line 15
A. Real Estate . . he's in reservoirs and inns, inns and concessions.

Page 38, Line 16
Q. Did you make that known to John Davis?

Appendix T

Page 38, Line 17
A. Yes, sir, I did.

Page 38, Line 18
Q. What is Mr. Davis' position?

Page 38, Line 19
A. Positively. He understands.

Page 38, Lines 20-21
Q. What . . okay . . uh . . I . . I . . inartfully worded that again. What's his . . what's Mr. Davis' title?

Page 38, Lines 22-23
A. He is the State, currently now, the Assistant Director as I understand it, took Mr. Costello's office or position.

Page 39, Line 9
Q. Were those underground storage tanks registered with the State of Indiana?

Page 39, Line 10
A. Yes, sir. They were and still are. As a matter of fact . .

Page 39, Lines 11-12
Q. Let me hand you what's been marked for identification as Plaintiff's Exhibit 12. There are as a part of 12, four sheets. What are those sheets, sir?

Page 39, Lines 13-14
A. These are underground storage tank registrations for the Indiana Department of Revenue fuel environmental tax

Appendix F

section

Page 39, Lines 15-16
Q Did the State identify who the owner . . the State through the . . I should say through the . .

Page 39, Line 17
A Department of . .

Page 39, Lines 18-19
Q . . Department of Environmental Management identify who the owners of those underground storage tanks are?

Page 39, Lines 20-22
A Yes, sir. We have two tanks there. It's listed as two. We pay permit for two and . . uh . . they say, "Lick Fork Marina, Incorporated, 10306 East Lick Fork Marina Road, Celestine, Indiana," owns those tanks.

Page 50, Lines 21-25; Page 51, Lines 2-4
A Then again we added . . uh . . in the following year concrete paving as well as additional concrete paving . . uh . . ramps to the steps, to the docks and a handicap ramp, as well as gazebo deck. Over the years we've added several birdhouses and facilities like that. On the back of the building, the south, or excuse me, the west end of the building, added a propane cage for safety of charging batteries so there wouldn't be any explosions or spills and stuff like that, a battery charging cage . . uh . . various other things, a lot of landscaping and other things that aren't actually in that picture right now.

Appendix 'I'

Page 52, Lines 2-3

A. Before we started it, it wasn't, but then they put it in before we built the building and installed our underground storage tanks.

Page 52, Lines 4-5

Q. To the east of the parking lot, the improvements that were made that are shown in proposed Exhibit 15 were made by whom?

Page 52, Lines 6-8

A. All ours. There was nothing there. No rock. No gravel. No road going around. No building. No access to that particular part of the Lick Fork property at all.

Page 54, Line 25

A. Yes, sir. I certainly would've moved it up on my property. Uh . . and . .

Page 55, Lines 20-22

A. Okay. The underground storage tanks . . there's a hump of grass there. They're buried under the ground there, as well as the concrete parking lot, a flag pole in the . . in the foreground there, as well as birdhouses.

Page 55, Line 23

Q. So we're seeing birdhouses and you . . you . . your family put them in.

Page 55, Line 24

A. Yes. It was . .

Appendix T

Page 56, Line 12
Q. They put up Martin houses. The Fallon family did that.

Page 56, Line 13
A. They eat twice there . . twice their weight in a day. They eat mosquitos.

Page 56, Line 14
Q. Then in the foreground is the underground storage tank.

Page 56, Line 15
A. Yes, sir.

Page 56, Line 16
Q. There's also an above ground, looks like a propane tank.

Page 56, Line 17
A. Yes, sir. That is . .

Page 57, Lines 8-9
A. The concrete parking lot of . . for unloading and loading of boats . . of customers to the rental boats.

Page 57, Lines 11-14
A. Number six is the gas tank vents, noted here to the left of the picture. As the underground storage tanks are lined up there, underground, and the flagpoles, additional flagpoles. We had the Indiana, the American flag and our flag there on those three.

Page 57, Line 15
Q. Were each of those easily removable?

Appendix T

Page 57, Line 16
A. Yes, sir. Yes, sir.

Page 57, Line 17
Q. And the stored under . . underground storage tanks were removable.

Page 57, Lines 18-19
A. We certainly planned on using that gas tank on my private property and the tanks too.

Page 58, Lines 7-13
A. Underground storage tank vents. We have vents here, the vent post; and these are installed newly with the new upgrades, as well as the spill, overflow. When the guy's filling, he has to fill here and he has to vent the fumes out here, as well as leak detectors and the pumps themselves. These are the two pumps that pump the gas down to the dock. We have the electrical, as well as the gas piping underground there you can't see. Uh . . the concrete protective post around the gas pump.

Page 58, Line 14
Q. And photograph nine?

Page 58, Lines 15-17
A. Is the rear of the building, and uh . . we're seeing some of the landscaping and the birdhouses, the electrical from the main meters going down to the building as well as some more gas pumps in the picture.

Page 59, Lines 5-6
Q. Now did you stand ready, willing and able to remove all

of these items prior to the end of your lease?

Page 59, Lines 7-13

A. Yes, sir. It would be a little difficult to coordinate the removal of everything at that time. It probably would've cost us . . uh . . several hundred thousand dollars. But the . . uh . . the men were on standby. I had local bulldozer operators to remove the gravel, the rip rap and anything that needed to go. We were going to put the dirt back. All the dirt from the original property is setting there. We were going to put it back and grass seed it, and that was . . that was the way we understood we had to leave it.

Page 60, Lines 20-21

A. Uh . . a sign here, birdhouses, a large gazebo deck and the concrete parking lot down here in front of the gazebo deck.

Page 60, Line 22

Q. Well, that gazebo, did you . . did you . . your family put that in?

Page 60, Line 23

A. Yes sir. We did.

Page 61, Lines 2-4

A. Yes sir, We just . . we run it over there after the . . uh . . a friend of mine built the stand. We rolled it over there on a . . ramps and put it right there in place and then bolted it to the deck after we built the deck.

Appendix T

Page 61, Lines 11-13

A. Number fourteen is the side view, seeing how we support the deck and built that. Um . . I was going to remove the deck itself on a big flatbed trailer and take it up the road and put it on my property without taking it apart.

Page 64, Line 12

Q. Were those items that could be removed, the water line?

Page 64, Line 13

A. Yes sir. Especially the meter. That's a $3,000 meter.

Page 66, Line 25

Q. So the rip rap you installed, was it easily removable?

Page 67, Lines 2-4

A. Yes sir, with just a scooper. They were going to scoop it back up the hill, pile it up on the road there, scrape it up and dump it in a dumpster . . in a dump truck.

BERNARD WILLIAM JOSEPH FALLON (CROSS-EXAMINATION)

Page 83, Lines 3-6

Q. Now you have indicated that with regard to all of the improvement that was placed on the property . . um . . from the gazebo to the building to the underground storage tank, that you paid for all of those items. Is that correct?

Page 83, Line 7

A. Yes, sir. All these items in the pictures and the ones we

explained.

Page 87, Lines 9-10

A. I don't think there's anything we put there, this is my personal opinion, that's not removable.

Page 87, Line 11

Q. Okay. And this. .

Page 87, Lines 12-13

A. Even if it's underground. Electrical cables can be removed. Water lines can be removed.

Page 88, Lines 5-6

A. I think everything there that we put there is our personal property and we should be allowed to take it with us.

Page 91, Lines 24-25

Q. Maybe you had said this already, but how were you going to remove the electrical lines that were installed? How did you plan to remove those?

Page 92, Lines 3-5

A. They could be pulled back through the conduit and just rolled back up . . different section, whatever . . whatever area we're dealing with. It could be just rolled up.

Page 93, Lines 22-24

A. We had a . . we had a landscape company to come in to remove the bushes and shrubs and trees and he was going to sell them to someone. A tree that size is pretty valuable cause you grow those from small saplings.

Appendix T

Page 95, Lines 3-5

A. And then re-seed the ground. It's placed right on the bank. The bank kind of comes down as you can see the . . the angle there. We had to level it up so we had to put it cer-- . . pretty . . pretty deep.

Page 96, Lines 14-16

Q. Okay. Number fourteen, the gazebo . . the gazebo, . . um . . let's see large deck and gazebo . . uh . . those . . those items there . . um . . why weren't they tak-- . . why didn't you take those items?

Page 96, Line 17

A. We were told to leave them. Uh . . you're saying picture fourteen?

PLAINTIFF'S WITNESS, CHARLES PUND (DIRECT)

Page 99, Lines 20-25

A. Buchta is . . they have done . . uh . . moved some buildings around town here. They moved the Gutzweiler home here in town. They've moved churches. They're . . they're . . it's a company that specializes in, like I say, moving buildings; and the structure you have there, it's a wood frame structure. It's light. I mean, I think it would be fairly simple, you know, for a person to be able to move something like that.

Page 101, Line 15-16

Q. Did . . were you personally involved in the construction of the buildings at Lick Fork Marina?

Appendix T

Page 101, Line 17
A. Yes.

Page 101, Line 23
A. I basically designed the projects.

Page 101, Line 24
Q. You designed the projects as well.

Page 102, Lines 2-3
Q. Are you familiar then, in your opinion, with what it would take to move the building?

Page 102, Line 4
A. Yes.

Page 102, Line 5-8
Q. And in your opinion, based on your experience, education and training, would it be feasible to move the large . . the largest structure at Lick Fork Marina from its present location to Bernie Fallon's location approximately one-half mile away, with which you are familiar.

Page 102, Lines 21-22
COURT: . . . You may answer the question.

Page 102, Lines 23-25; Page 103, Lines 2-5

A. Yeah. It would be movable. Like I say, the building is a wood frame structure; and we've got anchor bolts in there, six foot on center, half inch anchor bolts which . . uh . . once you find the pattern, I mean, basically just

open the walls up on the inside, remove some drywall. You can loosen the bolts up. The building can be raised up. I mean, you could bring a crane in there and pick it up and swing it up onto the parking lot onto the . . uh . . movable dollies and thus move it to the location.

Page 103, Line 6-7

Q. Would your company have been available to move it had it been asked in the spring . . er . . winter or spring of this year?

Page 103, Line 8

A. At the spring of this year?

Page 103, Line 9

Q. Yes, sir.

Page 103, Line 19-20

Q. Would it be fair to say that you could have moved all of the improvements on the Lick Fork Marina had Streicher Construction been asked to do so?

Page 103, Line 21-22

A. Yes. I mean, if . . if that's what Bernie would've wanted, I mean, we could've worked it out to have materials moved.

PLAINTIFF'S WITNESS, DOUGLAS HULSMAN (DIRECT)

Page 109, Line 10

Q. Does wiring have value?

Appendix T

Page 109, Line 11
A. Yes, it does.

Page 109, Line 12
Q. Does the boxes, the electrical boxes have value?

Page 109, Lines 13-22
A. Yes, they do. And . . and all the boxes for the docks are fastened to the docks. We . . we put all of that in such that if Bernie . . I . . I . . the thought of moving to another location totally was never mentioned to us; but we put the things in with cords and a conduit such that if he decided he wanted to put the houseboat dock down to the other side someplace or put another fishing boat dock in, all the . . all the conduits were removable; and the cables could be pulled out of conduits in the ground such that he could float that out, move it over someplace else and pull the cable back through again . . uh . . to put it back together. They're made that way so they can be added onto or taken apart.

Page 109, Lines 23-24
Q. Well, if Bernie had asked you to do it, and I suppose if the State had let him, could the . . could you have removed wire for it?

Page 109, Line 25
A. Yes, we could've.

Page 110, Lines 11-15
A. Yes. Yeah. It . . yes, it could've. Everything . . everything is wired with junction boxes for the sake of being able to . . to make changes if he wanted to add on

Appendix T

or move any of the . . any of the sections, so that would've been very easy to move. It just would've taken some time to take it apart and put it back together. It all bolts together.

Page 110, Line 16.
Q. Were you able to do that?

Page 110, Line 17.
A. Yes.

Page 110, Line 18.
Q. To do that job?

Page 110, Line 19.
A. We would've been. We were up there practic--. .

Page 110, Line 20.
Q. Still are today.

Page 110, Line 21-23
A. . . we were . . yeah . . we were up there practically every spring adding or moving some sections of that, and some of those were even taken apart and moved not too many years ago to make room for others.

APPENDIX U - RECEIPTS FOR UNDERGROUND STORAGE TANK REGISTRATION, INDIANA DEPARTMENT OF REVENUE FUEL & ENVIRONMENTAL TAX SECTION

RECEIPT FOR
UNDERGROUND STORAGE TANK REGISTRATION
INDIANA DEPARTMENT OF REVENUE
FUEL & ENVIRONMENTAL TAX SECTION
2001
BILLING PERIOD 7/1/00 TO 6/30/01

Amount Received: $180.00

Robert L. McGurer
Authorized Representative

04/04/2001
Receipt Date

Owner ID: 1994
Owner: Lick Fork Marina Inc.
10306 E Lick Fork Marina
Celestine, IN 47521--962

Identification No: 5227
Number of Tanks: 2
Location of Tanks:
10306 E. Lick Fork Marina
Celestine, IN 47521-9629

SPECIAL NOTES TO THE OWNER

1. In compliance with House Enrolled Act 1583, this receipt shall be maintained at the place of business where the tank is located and if no place of business exists where the tank is located, then at the place of business or residence of the owner of the tank. The owner shall produce the receipt for inspection at the request of any authorized representative of the department or the state fire marshal.

2. In the event of a change of ownership, the current owner must notify:

Appendix U

Indiana Department of Environmental Management
2525 North Shadeland Ave.
Indianapolis, IN 46219-1787

ATTN: U.S.T. Section

Appendix U

RECEIPT FOR
UNDERGROUND STORAGE TANK REGISTRATION
INDIANA DEPARTMENT OF REVENUE
FUEL & ENVIRONMENTAL TAX SECTION
2000
BILLING PERIOD 7/1/99 TO 6/30/00

Amount Received: $180.00

Robert L. McGurer	03/01/2000
Authorized Representative	Receipt Date

Owner ID: 1994
Owner: Lick Fork Marina Inc.
10306 E Lick Fork Marina
Celestine, IN 47521--962

Identification No: 5227
Number of Tanks: 2
Location of Tanks:
10306 E. Lick Fork Marina
Celestine, IN 47521-9629

SPECIAL NOTES TO THE OWNER

1. In compliance with House Enrolled Act 1583, this receipt shall be maintained at the place of business where the tank is located and if no place of business exists where the tank is located, then at the place of business or residence of the owner of the tank. The owner shall produce the receipt for inspection at the request of any authorized representative of the department or the state fire marshal.

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Appendix U

Indiana Department of Environmental Management
2525 North Shadeland Ave.
Indianapolis, IN 46219-1787

ATTN: U.S.T. Section

Appendix U

RECEIPT FOR
UNDERGROUND STORAGE TANK REGISTRATION
INDIANA DEPARTMENT OF REVENUE
SPECIAL TAX DIVISION
1998
BILLING PERIOD 7/1/97 TO 6/30/98 860244-6

Received Five Hundred Eight and 00/100 $$$580.00

ROBERT L. McGURER 03/26/98
Cashier (Mo/Da/Yr)

Owner:
Lick Fork Marina, Inc. 01994
10306 E Lick Fork Marina
Celestine, IN 47521-9629

Identification Number 005227
Number of Tanks 2
Location of Tank(s)
10306 E Lick Fork Marina
Celestine, IN 47521-9629

SPECIAL NOTES TO THE OWNER

1. In compliance with House Enrolled Act 1583, this receipt shall be maintained at the place of business where the tank is located and if no place of business exists where the tank is located, then at the place of business or residence of the owner of the tank. The owner shall produce the receipt for inspection at the request of any authorized representative of the department or the state fire marshal.

2. In the event of a change of ownership, the current owner must notify:

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Indiana Department of Environmental Management
2525 North Shadeland Ave.
Indianapolis, IN 46219-1787

ATTN: U.S.T. Section

Appendix U

RECEIPT FOR
UNDERGROUND STORAGE TANK REGISTRATION
INDIANA DEPARTMENT OF REVENUE
SPECIAL TAX DIVISION
1997

760005-39

Received Five Hundred Eight and 00/100 $$$580.00

ROBERT L. McGURER 01/16/99
Cashier

(Mo/Da/Yr)

Owner:
Lick Fork Marina, Inc. 01994
10306 E Lick Fork Marina Identification Number 005227
Celestine, IN 47521-9629 Number of Tanks 2

Location of Tank(s)
10306 E Lick Fork Marina
Celestine, IN 47521-9629

SPECIAL NOTES TO THE OWNER

1. In compliance with House Enrolled Act 1583, this receipt shall be maintained at the place of business where the tank is located and if no place of business exists where the tank is located, then at the place of business or residence of the owner of the tank. The owner shall produce the receipt for inspection at the request of any authorized representative of the department or the state fire marshal.

2. In the event of a change of ownership, the current owner must notify:

Appendix U

Indiana Department of Environmental Management
2525 North Shadeland Ave.
Indianapolis, IN 46219-1787

ATTN: U.S.T. Section

APPENDIX V - LETTER TO BERNARD W. FALLON FROM THE DEPARTMENT OF THE ARMY, U.S. ARMY ENGINEER DISTRICT, LOUISVILLE CORPS OF ENGINEERS DATED AUGUST 27, 2001

August 27, 2001

Real Estate Division
Civil and Special Projects Branch

Mr. Bernard W. Fallon
9820 E. Ellsworth Road
Celestine, IN 47521

Dear Mr. Fallon:

Per your request in a letter dated August 23, 2001, enclosed, you will find a complete U. S. Government real property inventory at Patoka Lake Project. You will note the marina is not listed at the Lick Fork site.

A copy of this inventory will also be provided to the Indiana Department of Natural Resources. If you have any further questions, you may contact Laura Whitworth at (502) 315-7015.

Sincerely,

s/Michael G. Barter
Michael G. Barter
Chief, Real Estate Division

Enclosure

APPENDIX W - EXCERPTS OF WITNESSES' TESTIMONY AT JURY TRIAL HELD AUGUST 20-21-22, 2003, IN DUBOIS CIRCUIT COURT

IN THE DUBOIS CIRCUIT COURT

CAUSE NO. 19C01-0104-CP-0152

LICK FORK MARINA, INC.,
Plaintiff,

VS.

STATE OF INDIANA,
Defendant.

PLAINTIFF'S WITNESS - STEVEN R. WOERNER (DIRECT)

Page 93, Lines 4-7
Q. As you stand here today, are you willing to stand on your professional reputation as an appraiser to say that the total just compensation, which you stated in paragraph four of Exhibit 66, is in fact three hundred seventy-four thousand eight hundred dollars?

Page 93, Line 8
A. I believe that it is, yes.

PLAINTIFF'S WITNESS - CHARLES PUND (DIRECT)

Page 136, Lines 8-10
Q. . . . How easy, if at all, was the . . would the gazebo

have been to remove from that location and move to Bernie's other property that adjoined the Patoka area about a half mile away?

Page 136, Lines 11-13

A. The gazebo itself is prefabricated, and it was brought on-site just on the back of a pickup truck, and it could have been just loaded . . or a back of a trailer. It could have been loaded on that trailer and, you know, hauled back off again.

Page 136, Lines 14-15

Q. You have a value then of ten thousand four hundred dollars on that gazebo and deck?

Page 136, Line 16

A. Yes. Yes, sir.

Page 137, Lines 2-23

A. The removal was basically . . most of the work was done by . . or figured by Lechner Excavation. Dan Lechner visited the site and he put the numbers together for removing the marina building, and he come, like I say, his total was seventy-five hundred dollars for . . for . . uh . . taking it down, and disposing of it. That included the landscape area; the concrete parking lot; the . . he was planning on taking that, tearing it up, and hauling it up to Bernie's property, and using it for fill up there. So he had backhoe time and truck time to take care of that. The handicap ramps and stairs, the same way; for two thousand six hundred and eighty dollars to basically remove the concrete and haul it to . . uh . . Bernie's property; which is just about a half mile away.

Appendix W

The utilities, Item (e) there, utilities and accessories leading to various docks; basically dig those up and tear them out. You know, we want to get the property back to its original state. For eighteen hundred dollars. In-ground fuel tanks and attachments there, we've gone to Marshall Swift valuation . . or Marshall valuation. Steve Woerner pulled out the . . the cost of what it would take to remove the tanks at twenty-one sixty. The utility lines for fifty-five hundred dollars. There, basically, removing them again. Lechner Excavation had put together an estimate to tear them out. And then remove all the rip-rap, the stone parking lots; sixty-four hundred dollars. There again, Lechner Excavation put the pricing together on that to remove that material, take it up to Bernie's property, and . . uh . . re-use that up there on Bernie's property, as far as rock parking lots and drives.

Page 140, Lines 4-7

Q. But you and Mr. Woerner and Mr. Hulsman then made a conclusion as expressed in Plaintiff's Exhibit 66, on the last page, four, that says that the total just compensation is three hundred seventy-four thousand eight hundred dollars?

Page 140, Line 8

A. That is correct.

Page 143, Lines 10-12

Q. With the exception of the in-ground fuel tanks, which I won't ask you about, and the utility lines, would the other items have been susceptible to movement to Mr. Fallon's property that was about a half a mile away?

Appendix W

Page 143, Lines 13-20

A. Yes, there, you know, there . . the . . uh . . like gazebo and the deck definitely could be, you know, moved. The rock . . like all the rock could be salvaged, as far as . . for, you know, new parking lots, you can take the rock up and there's, you know, like I say, thousands of tons of rock there. It could be, you know, loaded on trucks and moved up to the site and re-used. Yeah, electrical panels, there's, I mean, there's some salvage value to electrical panels, and, you know, could possibly be used, you know. Bird houses, . . uh . .

Page 143, Line 21

MS. HANLEY: Q. Bird houses is not one of the items that's listed here.

Page 143, Lines 22-23

A. That item would be in the landscaping; is basically where the bird houses are at.

Page 143, Line 24

Q. They look like martin houses. Is that what they were?

Page 143, Line 25; Page 144, Line 2

A. Correct. Martin houses, I'm sorry. You know, flag poles; . . uh . . there's a lot of things that can be, you know, you know, salvaged on a piece of property.

Page 144, Line 3

Q. Are they practical to move?

Page 144, Line 4

A. They . . Yeah, they would be practical to move.

Appendix W

PLAINTIFF'S WITNESS - DAVID MILLER (DIRECT)

Page 173, Line 16
Q. What, in your opinion, is the cost of removal of improvements?

Page 173, Line 17
A. Nineteen thousand seven hundred and sixty dollars.

Page 173, Line 18
Q. And what is the cost of restoration of the land?

Page 173, Line 19
A. Two thousand dollars.

Page 173, Lines 20-21
Q. So then, sir, what, in your opinion, as of March 31, 2001, is total just compensation?

Page 173, Line 22
A. Four hundred and sixty-one thousand two hundred and forty dollars.

PLAINTIFF'S WITNESS - DOUGLAS HULSMAN (DIRECT)

Page 210, Lines 4-5
Q. And did you also agree on the cost to remove the personal property from the defendant's land?

Page 210, Line 6
A. Yes. I agree with what we arrived at. That it should be correct.

Appendix W

Page 210, Line 7
Q. And what is that figure, sir?

Page 210, Line 8
A. Thirty thousand two hundred dollars.

Page 210, Line 9-10
Q. And a figure then to restore the land to its condition before the improvements were put on by the Fallon family?

Page 210, Line 11
A. That was two thousand four hundred dollars.

Page 210, Line 12
Q. So what then was your opinion as to the total just compensation?

Page 210, Lines 13-14
A. We thought the compensation should be three hundred seventy-four thousand eight hundred dollars. Was the figure we came up to.

PLAINTIFF'S WITNESS - BERNARD FALLON (DIRECT)

Page 268, Lines 24-25
Q. What in you opinion then is total just compensation for you, in accordance with the court's ruling, for your family?

Page 269, Line 2
A. I think six hundred and sixty-nine thousand dollars is fair.